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For the Sake of Argument: A Behavioral Analysis of Whether and How Legal Argument Matters in Decisionmaking

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FOR THE SAKE OF ARGUMENT: A BEHAVIORAL ANALYSIS OF WHETHER AND HOW LEGAL ARGUMENT MATTERS IN DECISIONMAKING

BRIAN SHEPPARD* AND ANDREW MOSHIRNIA**

ABSTRACT

The belief that legal argument makes a difference to the resolution of legal disputes is one of the most fundamental tenets of the American legal system. Despite its importance, few have empirically examined whether and how legal argument matters to the adjudication of a dispute. In this article, we discuss our design and implementation of a new behavioral experiment that allows us to observe some of the effects of legal argument in the simulated judicial resolution of a politically divisive case. Our subjects, recent law school graduates and law students, acted as judges in such a case.

The results from this experiment provide support for the notion that legal argument matters but not in the ways that its proponents expect. Firstly, legal argument had an effect on our subjects only when the applicable law was a bright-line, constraining rule. Secondly, within those parameters, it appears that the presence of legal argument made our subjects less likely to resolve their cases in accordance with the straightforward interpretation of that rule and more likely to choose the outcome that they personally preferred.

The results further support a new understanding of the function of argumentation in the context of legal decisionmaking, one that does not fit the charitable account advanced in our law and by our law schools. Rather than serving as one of the key components of an environment in which the most persuasive legal justifications rise to the top, legal argument might serve as an instrument for judges to reach their desired results with less effort. In our simulation, legal argument appears to have provided such a shortcut, and one that our subjects used to further personal or ideological ends.

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I. INTRODUCTION

In a very obvious sense, arguments matter. Indeed, they matter so much that we often work very hard to avoid them. At one time or another, everyone has insisted that he or she does not want to argue, demanded that someone stop arguing, or regretted that he or she had started an argument. Many of us can cite an argument as the reason that we ended a serious relationship.¹ And almost no one wants to earn a reputation for being argumentative.²

On the other hand, if you are reading this article, chances are good that you are in the argument business. Lawyers get paid for anticipating and drafting arguments. Law professors get paid for teaching students how to make arguments. Judges get paid for weighing arguments against each other. And law students hope to get paid for doing any one of those things. We might hate argument, but there are at least economic reasons for us to love *legal* argument.

Of course, the distinction between argument and legal argument is a hazy one.³ Some types of arguments, such as arguments as to the basic fairness of something, are as prevalent in non-legal contexts as they are in legal ones. While this makes the question as to the precise location of the border between legal and non-legal argument philosophically interesting, that is not our concern here. Rather, we seek to include under the umbrella of legal argument those types of argument that are typically raised in undoubtedly legal contexts,

1. Cf. ALISON CLARKE-STEWART & CORNELIA BRENTANO, DIVORCE: CAUSES AND CONSEQUENCES 146-48 (2006) (discussing relationship between spousal argument and divorce in research of childhood development).

2. It is notable that the example sentence for the first definition of “argumentative” in a prominent online dictionary focuses on aspirants to the legal industry. *Argumentative Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/argumentative> (last visited Feb. 12, 2013) (“fond of or given to argument and dispute; disputatious; contentious: *The law students were an unusually argumentative group.*”).

3. The related question of whether legal reasoning is distinct from reasoning in general has long attracted the attention of legal philosophers. See, e.g., Lewis A. Kornhauser, *Conference: The Path of the Law Today: A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 758 (1998) (“Both historically and currently, most of the debate among lawyers and legal philosophers concerning autonomy has focused on the nature of legal reasoning. The debates differ in the antagonist to the claim of autonomy; that is, they differ in their views concerning what non-legal considerations enter into legal reasoning.”).

such as trial hearings or appellate briefs. Fortunately, there are several examples of argument that clearly fall within these contexts, and we use the label “legal argument” to characterize them. To be clear, the arguments that we are characterizing as legal are not of the sort that would be unwelcome in non-legal contexts, rather we contend only that they would be welcome in legal contexts.

To identify a handful of these arguments, we need only consider the largely patterned manner in which lawyers seek to win disputes: advocates typically raise arguments regarding the facial meaning of authoritative legal documents (“text” arguments), the coherent interpretation of binding judicial decisions (“precedent” arguments), the intent of those that drafted a law (“legislative intent” arguments), and/or the policy implications of resolving the dispute in their favor (“public policy” arguments).⁴ These argument types should be familiar; they are taught at a very early stage of law school. Indeed, the Carnegie Report, arguably the impetus behind the ongoing effort to reform and rehabilitate legal education,⁵ went so far as to claim that the first year of law school transforms us into believing that such arguments make up the “legal landscape” itself.⁶ While this list of legal arguments is not exhaustive, and it is possible that some examples might additionally fit into other categories of argument, there can be little doubt that they are representative of the kinds of claims that lawyers make.

As it is so central to our legal profession, we might expect that the empirical scholarship on the effects of legal argument would be vast. It is not. Legal scholars appear to have their own uniquely incongruous relationship with legal argument: they very often concoct legal arguments, but they seldom examine how legal arguments matter to the adjudication of the disputes to which they apply. It is tempting to excuse this asymmetrical research program using common sense: legal argument would not be so pervasive were it inconsequential. But even if this intuition is right—and this can be doubted⁷—it still

4. This typology is drawn from the very popular law school textbook: WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 13-16 (2d ed. 2008).

5. See Editorial, *Legal Education Reform*, N.Y. TIMES (Nov. 25, 2011), http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html?_r=0.

6. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 54 (2007) (“Law students, that is, are learning to live conceptually in what Mertz calls a ‘legal landscape,’ a conceptual space that is defined purely in terms of legal argument . . .”).

7. Some commentators, often judges, doubt whether legal argument makes a difference in certain narrow circumstances, such as during oral argument on appeal. See, e.g., Mark R. Kravitz, *Words to the Wise*, 5 J. APP. PRAC. & PROCESS 543, 545-46 (2003) (“[S]ome appellate judges privately grouse that oral argument is a waste, both of their time and the litigants’ money.”). Virtually no one doubts, however, that legal argument, as a general matter, has some effect on judicial decisionmaking. Perhaps Lawrence Friedman comes closest, but even he concedes that legal arguments make “extremely small” differences. See Lawrence M. Friedman, *Taking Law and Society Seriously*, 74 CHI.-KENT L. REV. 529, 532

leaves us with much to learn about *how* legal argument matters. What little relevant scholarship exists tends to focus on the related but distinct topic of whether the presence of professional⁸ or high quality representation matters.⁹ Our focus here is narrower and more fundamental; we want to know more about the effects of legal argument itself. How would adjudication be without it?

Our constitutional jurisprudence articulates a particular account of how legal argument impacts adjudication. The Supreme Court has premised the very right to counsel, at least in part,¹⁰ upon it.¹¹ Under a distinct set of circumstances, parties have a constitutional right to retain an advocate who will make legal arguments that both advance their legally permissible interests and are colorable interpretations of the law.¹² These positions constitute the set of “valid” legal argument.¹³ If both sides of an issue are represented by zealous advocates

(1999) (“I hate to be raining on the parade, but my view, in brief, is that formal legal argument as such probably does not make much of a difference in the world.”).

8. Among the best examples of this sort of scholarship is the article by Greiner, Patanayak, and Hennessey, in which the authors designed a randomized control trial that allowed them to compare the outcomes in summary eviction proceedings between those who received full representation from a legal services organization and those who received limited “unbundled” legal assistance from that same organization. See D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 925-27 (2013). Among other things, they found that a significantly higher percentage of the litigants in the former category were able to remain in their homes. See *id.*

9. See discussion *infra* Part II.B.

10. Of course, it is equally clear that the right to counsel is also rooted in notions of procedural fairness. The landmark Supreme Court decisions guaranteeing the right to counsel were largely focused on guaranteeing equal access to counsel. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (premiering right to counsel in criminal trial on Due Process Clause); *Douglas v. California*, 372 U.S. 353 (1963) (premiering right to counsel in first criminal appeal on Equal Protection Clause). Even so, procedural fairness owes much of its constitutional importance to the fact that it is perceived to make a difference to the determinations made thereunder. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A person charged with a crime] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

11. Recently, the Supreme Court stated:

The earliest case generally cited for the proposition that ‘the right to counsel is the right to the effective assistance of counsel,’ was based on the Due Process Clause rather than on the Sixth Amendment. And even our recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel ‘is critical to the ability of the adversarial system to produce just results.’

United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (citations omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) and *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

12. See, e.g., *Gideon*, 372 U.S. 335 (guaranteeing right to counsel in criminal trial).

13. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law

making valid legal arguments—as is legally mandated¹⁴—judges are most likely to be presented with the best possible arguments on either side of a legal issue.¹⁵ As a result, judges are better informed and are more likely to reach the correct result in a case, thus serving the interests of justice. This account of legal argument’s role in adjudication has been called the “Legalist” position, perhaps because it shares many of the critical assumptions of the “Legal Model” of judging¹⁶ and Liberal Legalism more generally.¹⁷

Many individuals are unconvinced that legal arguments perform such a salutary civic function. Instead, many adherents to the Critical¹⁸ view contend that legal argument serves to obscure or, worse yet, to fictionalize law’s directives rather than to elucidate them, when it matters at all. “A . . . Legalist . . . believes that legitimate legal argument helps us to achieve justice. [On the other hand, m]any Crits believe that legitimate legal argument is an opiate of the

and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”)

14. See, e.g., *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000); *Nix v. Whiteside*, 475 U.S. 157, 189 (1986). See also MODEL RULES OF PROF’L CONDUCT Preamble: A Lawyer’s Responsibilities ¶ 2 (2007) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

15. See, e.g., *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984), *vacated for want of jurisdiction*, 472 U.S. 424 (1985) (“[T]he adversary system is based on the premise that the truth is best ascertained . . . through the zealous and competent presentation by each side of its strongest case.”); Greiner et al., *supra* note 8 (discussing proposition that cases in which both parties are represented are more likely to have reached correct legal outcomes).

16. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64 (1993) (“The legal model . . . holds that the Supreme Court decides disputes before it in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, the intent of the framers, and a balancing of societal versus constitutional interests.”); David Landau, *The Two Discourses in Colombian Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT’L L. REV. 687, 688-89 (2005) (describing the Legal Model as Legalist, stating, “The challengers to attitudinal and strategic scholars are a loosely defined group of academics identified as legalists; they believe that judicial behavior is best seen not as an attempt to maximize some political policy goal to which the judge is attached, but as a response, at some level, to the judge’s notion of what the law is. . . . Legalist models have thus not gotten very far beyond focusing on mechanical adherence to precedent.”).

17. Motoaki Funakoshi, *Taking Duncan Kennedy Seriously: Ironic Liberal Legalism*, 15 WIDENER L. REV. 231, 276 (2009) (“[L]iberal legalists believe that legal interpretation is a matter of application of the method well defined in advance, which thereby warrants necessitarian truth . . .”).

18. There is, of course, a well-known strand of legal theory known as Critical Legal Studies (CLS), and its members are often referred to as “Crits.” See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 41 (2008). The Critical position that we describe here shares many similarities with CLS, but we do not label it as such because we wish for it to be more inclusive than CLS: it includes all viewpoints that express doubt as to the truth of the Legalist account of legal argument’s effect on adjudication, whether for formal or behavioral reasons.

masses—i.e., conceals the unjust realities of our culture and retards its reformation.”¹⁹

One way to explain the differences between Legalists and Critics on this front is to consider their views on the constraining power of law itself—that is, on the ability of law to provide clear directives to judges as to how correctly to resolve cases (the formal dimension of constraint) and the likelihood that judges will follow those directives even if they would otherwise prefer not to (the behavioral dimension).²⁰

On the one hand, the Legalist account assumes that, in most cases, the law provides directives that will lead judges to the internally correct or best answer²¹ with reasonable effort. As a result of this formal clarity, valid legal arguments tend to play an information-gathering role, providing the judge considering them with the resources that she needs to find the correct answer.²² Legal argument also serves a behavioral function. It helps to keep judges honest by making the best arguments for each side more obvious to higher courts and the general public; it makes judges who disregard superior arguments more likely to suffer criticism. For the Legalist,

19. Richard S. Markovits, “*You Cannot Be Serious!*”: A Reply to Professors Balkin and Levinson, 74 CHI.-KENT L. REV. 559, 575 (1999).

20. The formal dimension of constraint comes from the clarity of the content of a legal directive in connection with a case; whereas the behavioral dimension comes from the motivations of the judge interpreting the legal directive. See H.L.A. HART, *THE CONCEPT OF LAW* 146 (Peter Cane et al. eds., 2d ed. 1994) (discussing possibility that judges are capable of choosing whether to be constrained by even the “clearest,” most formally constraining laws because it is “never psychologically or physically impossible for human beings to break or repudiate them”).

21. Judge Posner is fond of the term “Legalism.” See Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 578 (2011) (footnotes omitted) (describing a more extreme, yet, in his opinion, commonplace legalist position, “[T]he legalists, believe (or pretend to believe) that adjudication is strictly analytical, with no tincture of ideology, no taking sides on issues of social or economic policy. The legalist theory of adjudication received its canonical modern expression by John Roberts at his senatorial confirmation hearing to be Chief Justice in 2005, when he said that the role of a Supreme Court Justice, which he would faithfully inhabit, was similar to that of a baseball umpire, who calls balls and strikes but does not make or alter the rules of baseball. This was echoed four years later by Sonia Sotomayor at her confirmation hearing. . . . The modern idea of the judge as analyst shares with the idea of the judge as oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an authoritative source, though in the modern view the transmission is not direct but is mediated by analysis.”).

Other scholars have adopted Posner’s description. See, e.g., Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97 (2009) (describing “legalism” using Richard Posner’s description as the belief that “a judicial decision [can] be determined by a body of rules constituting the ‘law’ rather than by factors that are personal to judges, in the sense of varying among them, such as ideology, personality, and personal background” and stating “in the legalist universe, all judges are potentially the same, all have the same task, and all are working from the same materials in search of an elusive but non-mythical beast: the ‘right answer’ to a legal question” (citations omitted) (quoting POSNER, *supra* note 18, at 41)).

22. See POSNER, *supra* note 18, at 41.

then, legal argument serves mostly as a safeguard to make judges less error-prone.

On the other hand, a well-known view among Critics is that internally correct right legal answers are quite rare, if they exist at all.²³ On account of this formal weakness, legal arguments provide, at best, superficially convincing justifications for deciding cases in spite of the fact that those justifications do not lead us to internally correct answers. Accordingly, legal argumentation that deigns to have identified the single correct answer in a dispute is posturing, but a dangerous sort of posturing. Arguments serve as ready-made justifications that assist the judge in crafting a decision that gives the false impression of having been derived directly from the dictates of law.²⁴ In short, legal arguments are little more than a means for judges to lull the general public into believing that the judges' decisions are dictated by law.

Somewhere in the vast space between those positions are those who believe that the law frequently provides directives that can lead judges to right answers but that those directives are often unclear or otherwise difficult to discover.²⁵ On this account, such cases are numerous but not overwhelming, with larger concentrations of them in the appellate courts.²⁶ When cases are difficult in this way, there is greater opportunity for legal argumentation to play an important role in determining their outcomes because the judges in those cases will be more inclined to view argumentation as a useful resource, not for tricking the general public, but for reaching right or best answers. While this version of the story sounds a lot like the Legalist account, Critics would be inclined to point out that law's formal obscurity limits the error correction function of legal argument; if there is no correct outcome in a case, then legal argument is incapable of making a

23. See generally J.M. Balkin & Sanford Levinson, *Getting Serious about "Taking Legal Reasoning Seriously,"* 74 CHI.-KENT L. REV. 543 (1999) (noting inconsistencies between actual legal argument practice and notion that there are correct legal answers in most cases).

24. See *id.* at 547-48.

25. The most sophisticated Legalist, Ronald Dworkin, admits that "hard cases" require "Herculean" effort, whereas easy cases are merely "hard" yet feasible for the judge putting forth the effort. See Ronald Dworkin, *Response*, 90 B.U. L. REV. 1059, 1080 (2010); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

26. See, e.g., Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1563 (2008) ("The emergence of the modern Supreme Court Bar is significant because advocacy matters. Better, more effective advocates influence the development of the law and there is generally no court where such advocacy can wield more far-reaching influence than the Supreme Court. . . . In recent years, the impact is expressed by a rise in the Court's business docket as the Court has responded favorably to the legal arguments raised on behalf of business interests that serve as the private Supreme Court Bar's primary clients.").

judge in that case more likely to arrive at one.²⁷ Making matters worse, advocates are not uniformly talented, experienced, resourced, or hard working. Some are more persuasive than others. As a result, judicial decisions tend to favor those individuals, groups, or entities that have superior counsel regardless of what the right legal answer might be.²⁸

Also residing between the two poles are those who believe that, even if a case *could* turn on a straightforward legal rule, it is likely that judges will be motivated to accord greater weight to the arguments of the side that seeks to bring about the outcome that those judges prefer regardless of the rule.²⁹ As a result of the behavioral infirmities of judges, the proffered legal arguments serve as little more than shortcuts on the road to providing an ostensibly legal justification to disguise the fact that a judge's decision was ideologically or personally motivated.

Thus, scholars who believe that valid legal argument in the adversarial system primarily helps judges discover the correct outcome in the dispute in which they are raised assume *both* that the law, itself, admits of reasonably discoverable right answers in the typical case and that judges will generally choose to heed those answers when they decide cases.³⁰ As described, critics of legal argument tend to disagree with one or both parts of that assumption.

Frank Cross recently stated, “[w]hether the judge is deciding [cases] according to the better legal arguments or to his or her ideology is the question. Quantitative empirical research is suited to help answer [it].”³¹ It is clear from the theoretical debate surrounding legal argument that any quantitative research will have to account for the constraining power of the legal norms that are understood to apply to a case. That is, an empirical study must account for a law's intrinsic capacity to cause a judge to decide in accordance with its directive when that judge would prefer, in the absence of that law, to decide otherwise.

27. Cf. Balkin & Levinson, *supra* note 23 at 544-48 (discussing how view that there is no correct outcome can undermine our faith in salutary functions of legal argument and reasoning).

28. See Lazarus, *supra* note 26.

29. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744-49 (2000) (footnotes omitted) (“The second or sharply negative view is often associated with what political scientists call the ‘attitudinal model’ of judicial behavior. This model posits that judges have fixed ideological preferences, and that case outcomes are a product of the summing of the preferences of the participating judges, with legal norms serving only to rationalize outcomes after the fact. Under this view, amicus briefs should have little or no impact on the outcomes reached by a court, because each judge’s vote in a case is assumed to be the product of his or her preestablished ideological preferences with respect to the issue presented.”).

30. See *id.*; Markovits, *supra* note 19.

31. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 14 (2007).

Recent studies (including one that inspired this project)³² have produced empirical evidence supporting that not only does law constrain, but also that the content of legal norms changes their constraining power.³³ Specifically, they provide support for the proposition that rules constrain more than do standards.³⁴ Generally speaking, legal rules are norms with content that limits judicial discretion by conditioning compliance upon bright-line or similarly descriptive criteria; a numerical speed limit is an example of a legal rule.³⁵ They permit straightforward adjudication: the law sets a speed limit of 30 mph, the defendant was traveling 50 mph, so therefore the defendant has violated the law.³⁶ Legal standards are at the opposite end of the constraint spectrum: they have content that invites discretion by conditioning compliance upon moral or other evaluative criteria; the cruel and unusual punishment test is an example of a legal standard.³⁷

In light of the relationship between legal argument and law's constraining power, the presence of legal argument should have a different impact depending on whether the law at issue is a rule or a standard. Secondly, we can expect that some proportion of judges will be motivated to reach outcomes that they prefer. When these judges face a clear directive that is at odds with that outcome, such as they would find in a case dictated by a single rule, we can expect that they will seek to work around that directive, and the presence of legal argument ought to have an impact on the success rate of that work. We seek to analyze these formal and behavioral dimensions of constraint by considering how legal argument affects the resolution of a dispute when the applicable law is either maximally constraining (such as under a rule) or minimally constraining (such as under a standard) and when there is a risk that the person applying that law will be motivated to resist its constraint.

32. Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 979-83 (2012).

33. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1494-95 (2008); Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81, 87 (2008); Brian Sheppard & Fiery Cushman, *Evaluating Norms: An Empirical Analysis of the Relationship Between Norm-Content, Operator, and Charitable Behavior*, 63 VAND. L. REV. 55, 68-71 (2010).

34. A summary of this research on the constraint of rules and standards is set forth in Brian Sheppard, *Calculating the Standard Error: Just How Much Should Empirical Studies Curb Our Enthusiasm for Legal Standards?*, 123 HARV. L. REV. F. 92, 99 (2011), available at http://www.harvardlawreview.org/issues/123/march10/forum_688.php.

35. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992).

36. We wish to add that even though this adjudication is straightforward, we do not endorse it as a correct, best, or right adjudication.

37. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 807 (2005).

The interaction between the type of legal norm content under consideration and the presence of legal argumentation has not yet been studied empirically. In this Article, we use a modified version of the experiment employed in the study that inspired this project to shed light on this interaction.

Although we discuss our findings in greater detail at the end of this Article, the results here draw a clear parallel to the results in that previous study. There, the results illustrated that it can be useful to conceive of time as a judicial resource, one that can make it easier for judges to convince themselves that they can reach results that are at odds with the plain dictates of a legal rule.³⁸ Likewise, the results here demonstrate circumstances under which legal argument can be understood as a judicial resource that can be put into service for the same ends.

In Part II, we examine the state of existing empirical scholarship on the effect of legal argument, explaining how this study makes a contribution. Thereafter, in Part III, we detail the mechanics of our experiment and our specific hypotheses, which we have derived from the existing literature. In Part IV, we discuss the results of the experiment. Finally, in Part V, we analyze the results and briefly consider policy implications and avenues for further study.

II. THE PROGRESS OF EMPIRICAL SCHOLARSHIP ON THE EFFECT OF LEGAL ARGUMENTATION

In this Part, we will describe the unique methodological challenges that exist for those social scientists who wish to isolate legal argument's effect, show how scholars have attempted to bypass those problems, and provide alternative approaches that address gaps in the literature. As to this final point, we explain how scholars ought to be mindful of three important lessons from the literature that inform the Legalist/Critical debate, and then we derive a competing model of legal argument influence from the literature as well as from the findings in a previous study.

A. *Methodological Challenges and Attempted Solutions*

A handful of scholars have begun using the tools of statistical analysis to examine the effect of legal argument in specific contexts.³⁹

38. See Sheppard, *supra* note 32, at 985-86.

39. See, e.g., Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55 (2007); Susan Brodie Haire et al., *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667 (2006); Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457 (2007) [hereinafter Johnson et al., *Oral Advocacy*]; Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006)

The findings have not been perfectly uniform,⁴⁰ but they generally provide support for the commonplace notion that legal arguments make a difference to the judicial determinations to which they pertain. We will describe these findings below.

One challenge to the empirical study of argument is that it can be methodologically difficult to isolate argument's effect when the object of study is actual courts. Legal argument is so ubiquitous among courts of law that it is virtually impossible to locate a court with available records that has both considered and not considered legal argument on the same issue such that adequate comparison of the two conditions can be made. Empiricists have found ways to bypass this problem, but these methods are not without cost.

One approach is to focus on a particular kind of argumentation, one that only periodically arises in the same court, such as the filing of amicus briefs. Indeed, a considerable portion of extant studies of legal argumentation have analyzed whether the presence of amicus briefs or a greater number of amicus briefs improves the chances that the side for which they were filed will prevail.⁴¹

A cost of taking this approach is that it makes it more likely that the findings are of limited application outside of the rather unusual manner of argumentation that they directly concern. In the case of amicus briefs, the legal arguments provided therein are merely supplements to the primary arguments raised by the parties themselves. Moreover, amicus brief cases make up only a small fraction of cases before the courts.⁴² By making them the focus of study, we lose sight of what the impact of legal argument as a general matter might be; as the study does not tell us whether the primary briefing is having an impact. Furthermore, there is the problem of selection bias: amicus briefs are not distributed randomly among the population of cases; rather, parties choose to file amicus briefs for very particular reasons such as ideology, publicity, goodwill, or the likelihood of success

[hereinafter Johnson et al., *Influence*]; Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RES. 331 (2001) [hereinafter Johnson, *Information*]; Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259 (2007); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998) [hereinafter McGuire, *Explaining Executive Success*]; Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POLITICS 187, 187-88 (1995) [hereinafter McGuire, *Repeat Players*].

40. Compare Johnson, *Information*, *supra* note 39 with Collins, *supra* note 39.

41. See, e.g., Collins, *supra* note 39.

42. See, e.g., Paul R. Michel, *Assuring Consistency and Uniformity of Precedent and Legal Doctrine in the Areas of Subject Matter Jurisdiction Entrusted Exclusively to the U.S. Court of Appeals for the Federal Circuit: A View from the Top*, 58 AM. U. L. REV. 699, 705 ("[A]micus briefs before [U.S. Court of Appeals] panels, even in obviously landmark cases, are rather rare.").

on the merits.⁴³ Thus, amicus and non-amicus cases might not be sufficiently alike to merit comparison.⁴⁴

Another way to bypass the comparison problem is to study the effect of argument *indirectly*. For example, a wealth of studies have analyzed whether the differences in the personal characteristics of the arguers correlate with differences in judicial decisions.⁴⁵ Because the creation and presentation of legal argument is the primary function that lawyers perform, studies that draw a connection between lawyer quality and judicial determinations can provide support for the notion that legal argumentation is making a difference.

Regardless of how one feels about the adequacy of quantitative measures of attorney quality, these studies are not designed to tell us whether legal argument, itself, affects legal constraint. Rather, the authors' efforts are primarily directed towards showing that imbalances in representation skill affect judicial decisions, particularly at the Supreme Court. To be sure, these studies provide support for the notion that good or bad representation is more and less effective, respectively, but this is different from analyzing legal argument generally in at least two ways. First, it makes it more difficult to disentangle the effect of legal argument from the other effects of legal representation, such as the effect caused by lawyer reputation, charisma, and the merits of the underlying case itself, to name a few. Secondly, the study of the differential effect of good and bad argument is simply

43. Ironically, this has been empirically examined as well. See Chris Nicholson & Paul M. Collins, Jr., *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RES. 382, 382 (2007) (analyzing reasons that Solicitor General files amicus briefs and stating, "[w]e find that the SG's decision to file an amicus brief is influenced by legal, political, and administrative considerations, suggesting that the SG is best viewed through the incorporation of a variety of theoretical perspectives").

44. A similar criticism has been leveled against many studies of attorney quality. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1152-53 (2007) ("Because they cannot establish that case assignment across attorneys was random, they raise serious questions regarding case selection bias, namely the aforementioned issue that case outcomes may reflect the matching between attorney and client, not simply attorney ability. For this reason, it is impossible to discern whether the differences in case outcomes are attributable to differences in quality across attorneys or differences in the distribution of cases across attorneys.").

45. See, e.g., Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005); Haire et al., *supra* note 39, at 684; Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498 (2005); Stacia L. Haynie & Kaitlyn L. Sill, *Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeal*, 60 POL. RES. Q. 443, 443-44 (2007); Johnson et al., *Influence*, *supra* note 39; Johnson, *Information*, *supra* note 39; McAtee & McGuire, *supra* note 39; McGuire, *Explaining Executive Success*, *supra* note 39, at 522; McGuire, *Repeat Players*, *supra* note 39; Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992); John Szmer et al., *Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada*, 41 LAW & SOC'Y REV. 279 (2007).

a different phenomenon than the effect caused by argument generally. It compares the effects of higher and lower quality argumentation rather than the effects of argumentation and the absence thereof. Both are worthy objects of study, but the analysis of legal constraint would be incomplete without consideration of the latter.

There is, however, another way to bypass the comparison problem, and while it does come with a cost, it provides better isolation of legal argument's effect than the previous two methodologies: behavioral experimentation. With the liberty of designing our own randomized case simulations, we can make legal argument an experimental variable while keeping other important dimensions of the case constant, such as the judge, facts, and law. In addition, we can introduce other variables that allow us to spot an interaction between the *type* of law being interpreted and the presence of legal argument. The vast majority of studies that examine legal argument effect do not compare its impact on different types of law.⁴⁶ In the following Part, we will explain how this could mean that an important interaction is being missed.

The downside of the behavioral experimentation approach is that it can be costly and can lead to results that lack external validity, particularly when simulations are used.⁴⁷ A simulation is not the real world, so it could be argued that the results are not generalizable to actual judges.⁴⁸ There are surely skills and practices that become refined, improved, or otherwise changed as one becomes more experienced in law, and it is possible that such changes might make a difference to legal argument's influence. For this reason, this Article does not seek to quantify in a universal way, the amount of argument influence; rather, it compares how those of roughly equal experience respond to legal argument under different conditions. In the methodology section, we further describe our efforts to minimize the problem of external validity, and we hope that the benefits of effect isolation far outweigh the costs to generalizability.

The aforementioned statistical analyses of courts have provided a number of useful lessons, each of which we have attempted to incorporate into experimental design, and we summarize these lessons in the following Part.

46. One exception is Johnson et al., *Influence*, *supra* note 39 (including whether the issue is statutory or common law in nature as independent variables).

47. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 38 (1983) ("However, experimental control usually comes at the cost of increased artificiality of the research environment. This means decreased external validity or generalizability of any observed cause-and-effect relationships.").

48. Cf., e.g., K. Anders Ericsson et al., *The Making of an Expert*, 85 HARV. BUS. REV. 115, 115-21 (2007) (stating "[n]ew research shows that outstanding performance is the product of years of deliberate practice and coaching not of any innate talent or skill" and finding that leaders can improve abilities through deliberate practice, feedback, and inner coaching that continually challenges them).

B. Three Lessons from the Empirical Literature on Legal Argument

Among the valuable existing literature on the effect of legal argument, there are three lessons that relate directly to the design of this project.

1. Judges Are Receptive to the Content of Legal Arguments

Paul Collins, Jr., who has authored or co-authored numerous studies of amicus brief influence, has provided evidence that U.S. Supreme Court justices and U.S. Courts of Appeals judges are influenced by the content of amicus briefs.⁴⁹ Justices are more likely to cast conservative or liberal votes in proportion to the number of conservative or liberal (respectively) amicus briefs filed.

With regard to conservative briefs, the results indicate that compared with a case in which a single conservative brief is filed (and a single liberal brief), when [ten] conservative briefs are filed (and one liberal brief), the most liberal justice in the data . . . is [six percent] more likely to vote conservatively. This increases to about [fourteen percent] for the vast majority of the Court . . . and is slightly attenuated for the most conservative justices in the sample . . . who are [twelve percent] more likely to vote conservatively in this situation. The results are virtually identical for liberal amicus briefs: the most liberal justice in the data is [six percent] more likely to cast a liberal vote as the number of liberal briefs moves from [one] to [ten], while the majority of the Court is about [fourteen percent] more likely [sic] cast a liberal vote.⁵⁰

In a separate study, Collins and Wendy Martinek found similar results in the U.S. Court of Appeals. They found that “amicus briefs filed in support of the appellant enhance the likelihood of that litigant’s probability of success” although the effect was more one-sided than the one observed at the Supreme Court: “amicus briefs filed in support of the appellee have no effect on litigation outcomes.”⁵¹ The one-sidedness is unsurprising, as the Courts of Appeals wield less control over their dockets and therefore affirm at a much higher rate. As a result, one can expect that the effect of legal argument has more room to make a difference on the appellant side of a dispute.

Lastly, Professor Pamela Corley analyzed U.S. Supreme Court opinions with plagiarism detection software and discovered that justices routinely borrow language from the briefs submitted to

49. See PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008).

50. *Id.* at 109-10.

51. See Paul M. Collins, Jr. & Wendy L. Martinek, *Friends of the Circuits: Interest Group Influence on Decision Making in the U.S. Courts of Appeals*, 91 SOC. SCI. Q. 397, 397 (2010).

them.⁵² While Corley did not analyze whether a positive result of plagiarism correlated with a justice's vote in that case,⁵³ she did observe several important patterns. Importantly, she discovered that justices were more likely to plagiarize briefs from more experienced attorneys, particularly briefs submitted by the solicitor general.⁵⁴

But how can we be confident that these studies provide support for the notion that the judges are influenced by the merit of the legal arguments in the briefs before them? Might they be responding to something else, such as the prestige of the filer or some other non-meritorious factor?

Collins's study is instructive in this regard. He identified a correlation showing that, generally speaking,⁵⁵ as the number of amicus briefs increase, the judges are more likely to favor the side for which they are filed *even though that position runs counter to their ideological or personal preferences*. Because judges follow these briefs against personal interest, Collins supposes, they must be convinced by the information contained therein rather than by non-meritorious reasons.⁵⁶ He further notes that this is a better explanation of the data than the leading counterposition, drawn from Attitudinalism, that justices would ignore the briefs and simply vote their policy preferences.⁵⁷ While we cannot be certain that judges who end up voting counter-ideologically are persuaded that the legal arguments in the briefs state the correct interpretation of the law on point, it is currently the best explanation available.

Lastly, it is worthwhile to add that amicus briefs are supplemental briefs often filed in tandem with other briefs for a particular dispute. It is possible if not probable that the effect of legal argument would be even more pronounced were the object of study the parties' briefs, which the deciding judges would more likely read.

2. *Judges' (Ideological) Preferences Matter*

While the results thus far would seem to support the Legalist position described in the introduction that law matters, probing deeper into the literature provides support for the Critical position.

Andrea McAtee and Kevin T. McGuire studied the influence of attorney advocacy quality (as measured by, among other things, Jus-

52. Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468, 468-78 (2008).

53. See *id.* at 477 ("[T]his study does not address whether the parties' briefs influence the vote on the merits.")

54. See *id.* at 476.

55. There are two important exceptions that are discussed in the following two subsections.

56. COLLINS, *supra* note 49, at 97-98.

57. See *id.* For a more in-depth discussion of Attitudinalism, see SEGAL, *supra* note 16, at 221-60.

tice Blackmun's famous oral argument scores⁵⁸ and the lawyers' experience) on the decisions of the Supreme Court.⁵⁹ They found evidence that the quality of advocacy correlated with the likelihood that the justices would choose outcomes in favor of the advocate, but there was a critical caveat—the effect was only among cases that were not salient.⁶⁰ Only “[i]n nonsalient cases [did] veteran lawyers of Supreme Court advocacy provide an advantage, regardless of whether they represent the petitioner or the respondent and regardless of whether they are arguing for a liberal or conservative outcome.”⁶¹ A case becomes “salient” when it has received more than a threshold amount of news coverage.⁶² In light of this definition, it is obvious that salience is a proxy for the level of importance that a justice has placed on the issue that he or she is resolving. Indeed, McAtee and McGuire characterize this important limitation in the same manner:

Experienced appellate advocacy, therefore, makes a significant contribution to the Court's consideration of the legal questions that, though they may merit the Court's attention, are *not* ones in which the justices themselves are heavily invested. In cases at the forefront of the judicial agenda—cases about whose outcomes the justices may care considerably—neither experienced members of the Court's legal community nor an impressive appearance before the justices can regularly persuade the justices to reconsider their views.⁶³

Moreover, it would appear that importance includes, to a considerable degree, the ideological relevance of the case. The only independent variables in McAtee and McGuire's study that were significant in *both* salient and non-salient cases were those that captured the ideologies of the justices.⁶⁴ Even more telling, they found that ideology, despite being a significant predictor in non-salient cases, carries much greater weight in salient cases.⁶⁵ While it might also be true

58. McAtee & McGuire, *supra* note 39, at 263; *see also* Johnson et al., *Oral Advocacy*, *supra* note 39, at 460-61 (“In order to do so, we draw on a unique set of data: notes taken by former Supreme Court Justice Harry Blackmun as he sat on the bench during oral arguments. In each case, he took notes that include information perfectly tailored for investigating the role of oral arguments at the Court.”).

59. McAtee & McGuire, *supra* note 39, at 259-64.

60. *See id.* at 273-74.

61. *Id.* at 273.

62. The authors in this section use the same measure for salience—whether the case “(1) led to a story on the front page of the [NEW YORK TIMES] on the day after the Court handed . . . down [the decision], (2) was the lead . . . case in the story, and (3) was orally argued and decided with an opinion.” This methodology was developed by Lee Epstein and Jeffrey A. Segal. *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 73 (2000).

63. McAtee & McGuire, *supra* note 39, at 273 (emphasis added).

64. *Id.* at 273-74.

65. *See id.* Other empirical scholars have observed this same phenomenon. *See* Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 191 (2010) (describing salience as “political salience”);

that salient cases tend to be more complex or simply more familiar (even in the rare instance that they are not ideological), scholars tend to characterize salience in political or ideological terms.⁶⁶

The results in other Supreme Court studies are similarly tempered by salience and ideology. Notably, Collins's findings that amicus briefs influence justice votes are also limited to non-salient cases,⁶⁷ and even Corley found that salient cases were less likely to result in plagiarism by the justices.⁶⁸

It might be tempting to conclude from these findings that ideology and legal argument are countervailing forces: the more ideology, the less likely will legal argument influence judges. But a closer look at Corley's study shows that the relationship is more complex. Her study found that legal argument continues to exert an influence on justices in salient cases so long as there is compatibility between the direction of the justice's ideology and the ideological direction of the particular legal argument studied. "Overall, the percentage of the opinion coming from the briefs is higher if the brief is high quality, if brief is ideologically compatible with the Court, and if the case is not politically salient."⁶⁹ She further found that the variable of ideological compatibility had the most predictive power out of all the other variables she tested (other than whether the solicitor general was the appellant).⁷⁰ When the justice does not agree ideologically with the result proposed in an argument, he or she is less likely to crib its language.

A tentative picture of ideological influence on the effect of legal argumentation appears from these Supreme Court studies. It would seem that when judges care less about the outcome of a case, particularly from an ideological point of view, they are more open to the arguments raised by both sides in a case. When judges care more about a case, however, they are more instrumental, considering legal argument only insofar as doing so serves their previously held preferences.

Of course, we ought to be mindful of the possibility that these lessons will not apply in a straightforward fashion to other courts. The Supreme Court is highly unrepresentative in a number of important respects, such as availability of resources and the proportion

Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 LAW & POL'Y 295, 307-09 (2006).

66. See Paul M. Collins, Jr., *The Consistency of Judicial Choice*, 70 J. POL. 861, 868-69 (2008) (concluding that "ideology plays a central role in salient cases" and that, "[c]ontrary to expectations . . . the justices' decision making is not especially unstable in complex cases"); Unah & Hancock, *supra* note 65 (providing empirical evidence that judicial ideology is a stronger predictor of outcomes in highly salient cases).

67. Collins, *supra* note 39, at 60.

68. Corley, *supra* note 52, at 4, 7-8.

69. *Id.* at 7.

70. *Id.* at 8-10.

of indeterminate legal issues.⁷¹ Still, this lesson ought to guide the formation of hypotheses for other judicial contexts.

3. *Judges' Capacities Are Limited, Which Affects the Influence of Legal Argument*

While Collins found evidence that, for non-salient cases, an increase in the quantity of argumentation simply adds to the persuasiveness of the position for which they advocate, he also found evidence that that relation only holds true to a point: eventually the number of amicus briefs will grow high enough to create decisional uncertainty, causing greater variance in judges' votes.⁷² Collins also discovered evidence that the higher the number of amicus briefs filed, the more likely a justice will choose to write separately or to join an opinion other than the opinion of the Court.⁷³

Collins contends that these results are best explained by a theory of information overload.⁷⁴ Judges are receptive to the arguments in amicus briefs, but their decisionmaking becomes unpredictable when the number of arguments becomes too high for the judges to comprehend.

There are other explanations, however. Udi Sommer points out that

[i]n fact the function of briefs may be to eschew obfuscation and clarify what used to be convoluted issues for the justices. . . . [T]he final behavioral effect might be similar—thinking more clearly about a case, justices might realize, for example, that the questions it presents involve four rather than just two policy dimensions. This may result in a greater number of separate opinions or more variance in decisionmaking.⁷⁵

Under either explanation, the judge's reliance on the briefs takes them to a new deliberative place, one that the judge would not likely have reached on her own.

C. *Synthesizing the Lessons for a Study of the Effect of Legal Argument*

In this Part, we combine the empirical lessons and then use the composite to create new competing models of legal argument effect that incorporate the impact of rules and standards.

71. The Court is highly unrepresentative of trial court practice and of alternative dispute resolution. See, e.g., Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83 (2008).

72. COLLINS, *supra* note 49, at 115-37.

73. *Id.* at 163-64.

74. *Id.* at 176-77.

75. Udi Sommer, Book Review, 43 LAW & SOC'Y REV. 943, 945 (2009) (reviewing PAUL M. COLLINS, *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008)).

1. *Attempting Synthesis*

Considering these lessons together, we can make a more accurate characterization of how legal argument affects judicial decisionmaking: judges conceive of legal arguments as tools for their own use. Like tools, legal arguments tend to be used only when the user feels that the tool will enhance performance. Otherwise, the cost of dragging oneself out to the shed to rummage through multiple toolboxes, or in the judge's case, slogging carefully through a brief, does not seem worthwhile. Thus, a judge who feels she is able to handle a case based solely upon her own understanding of the issue before exposure to the argument is less likely to consider and be influenced by the legal arguments presented to her. This is most likely to occur when the case presents an issue that connects with a familiar ideological topic. Similarly, a judge that feels the arguments are not likely to be sophisticated enough to instruct her on the nuances of a complex case is less likely to consider them. On the other hand, a judge is more likely to consider and be influenced by legal arguments on issues with which the judge is unfamiliar or upon which the judge has yet to make a considered judgment.

Secondly, despite a judge's conclusion that legal argument is likely to enhance her decisionmaking, it is possible that legal argument could make her decisionmaking uncharacteristic. She might become overwhelmed by the overload of information to which she has chosen to expose herself and begin to deliberate in unpredictable ways. Just as the careless carpenter can get too ambitious in her use of tools in DIY projects thereby causing calamity, a judge can expose herself to too many arguments and make an uncharacteristic decision. The take home point for the purposes of this Article is somewhat simpler: Judges are human—they sometimes want assistance, they can make errors, and they can learn new things.

Recall that the difference as to the constraining power of law is an important factor in explaining the differences between Legalist and Critical views of legal argument's effect. Now that we have reason to conceptualize legal argument as a tool for a motivated judge, we have a better sense of how legal constraint operates in our model. For a judge that is motivated to reach a particular outcome, the presence or absence of a constraining legal directive will make the judge's path to that preferred outcome more or less difficult, respectively. Existing studies have not considered how the status of a law as a rule or a standard will affect the impact of legal argument on decisionmaking.

Moreover, we have drawn our lessons largely from research of the U.S. Supreme Court, which controls its own docket and takes

atypically complex, open, and ideologically fraught cases.⁷⁶ On the one hand, these factors should make legal argument a less valuable tool than in the typical case, which is much more legally straightforward, time-constrained, ideologically less salient and/or familiar.⁷⁷ On the other hand, judges in typical cases often get repeat issues with which they are quite familiar, which could itself dampen the effect of argument. Thus, there are reasons to wonder about whether the results of Supreme Court argument studies are generalizable to the larger realm of typical cases, thus making room for further study. We will revisit this issue in Part IV.

2. *New Alternative Models*

Without empirical guidance on this question, we remain saddled with the aforementioned competing models of legal argument effect.

Legalists, who believe that correct or best legal answers are readily discoverable with reasonable effort and that judges will be compelled to decide in accordance with those answers,⁷⁸ would likely contend as follows: in the typically straightforward case governed by a rule, the judge's decision would not be as impacted by the presence of legal argument as it would be if the same case were governed by a standard. The rule, with little else, should be sufficient to provide the correct answer, and that answer will dictate the judge's decision in the case.⁷⁹ Under standards, the judge will likely see the legal directive as open-ended, leading her to believe that the work necessary for discovering the best legal answer will be more challenging and wide-ranging than under rules.⁸⁰ As a result, the diligent judge will be more receptive to the claims raised by the parties who offer different vantage points on the fit, justification, and/or ramifications of the law.

The Critical view can be quite different. Those Critics who believe that the correct legal answer is either undiscoverable or will not compel the judge to change her decisionmaking, such as extreme Attitudinalists, would have to argue that, *regardless* of the law's content, legal argument in the typical case would have the same effect—almost nothing.⁸¹ The judge under either a rule or a standard

76. See Lazarus, *supra* note 26, at 1507-09.

77. See *id.*

78. See *supra* Part I.

79. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621-22 (1992).

80. See RONALD DWORKIN, *LAW'S EMPIRE* 220 (1986).

81. It is, of course, possible that lawyers would raise arguments designed to change judges' ideological or personal preferences or to inform them of ways that outcomes might relate to those preferences. For example, a lawyer might try to convince a judge that this is one of those exceptional situations in which a *real* libertarian would vote to uphold a law that appears to be restricting individuals' choices. Such arguments are rare, however, perhaps because they are frowned upon as legally invalid, because judges' preferences are

would simply favor the legal arguments for the side on which her ideological or personal preferences lie. Though the judge might use arguments to save time and effort, she will not use it for the sake of making and following an objective appraisal of the law's dictates. Therefore, argument will not change the likelihood that the judge will reach an outcome that is at odds with what she would prefer in the absence of law. In short, because the law fails to constrain as a general matter, the presence of argument will almost never increase the likelihood that constraint will occur regardless of whether the operative law is a rule or a standard.

Fortunately, existing empirical work, including our work in previous studies, provides a third option. On the one hand, our first lesson tells us that we ought to credit the Legalist belief that the content of legal arguments often impacts the judge's deliberation in predictable ways. On the other hand, the second lesson tells us that judges sometimes view argument through the lens of their ideological or personal preferences, so we have reason to credit the Critical belief that legal argument will be put into service of the judge's ideological agenda. Lastly, in light of the third lesson, we must remind ourselves that judges are human and have limited capacities, and legal arguments can serve as tools that augment those capacities.

Regarding this last point, our previous study showed us that rules, unlike standards, have the power to stress the judge's perception that she will have the capacity to reach a legally convincing result that is consistent with her own ideology or personal preferences.⁸² Rules have the unique power to provide straightforward directives that are at odds with what the judge would think is the right or best outcome, all things considered. Judges, however, possess the countervailing capacity to reach their preferred outcomes despite the rule's command. They do this through engaging in "work," a sometimes painstaking interpretive enterprise.⁸³ Because work is difficult, judicial resources are important. Sometimes the judge will cave in to the rule's command because she does not have the time or energy to successfully complete her work. We can theorize that legal argument impacts judicial decisionmaking by increasing the success rate of work; it can ease the judge's burden by providing ready-made justifications or useful information.

Combining these three features, a new, more complex model (the "Combined Empirical Model") emerges: judges that are subject to rules that they perceive as calling for a result that conflicts with

typically static, or because judges are usually aware of the personal or ideological implications of their votes in the absence of argument. Nevertheless, the Attitudinalist might concede that such arguments could make a difference. I owe Carl Coleman for this point.

82. See Sheppard, *supra* note 32, at 957-60.

83. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 166-68 (1997).

their ideological or personal preferences will be more likely to consider the content of legal arguments than if they were under a standard because they are more in need of a tool to legally justify their ideologically or personally preferred result. When the judge perceives that the arguments provided on that side of the issue are valuable—and this is a determination that will likely also consider the relative value of the opposing argumentation—the presence of those arguments should make it easier for the judge to craft a satisfactory justification for their preferred position.

In Table 1, we show how these various positions describe the effect of legal argument.

Table 1: Competing Models of Legal Argument Impact under Rules and Standards

<i>Philosophical Position</i>	<i>Rules</i> ⁸⁴	<i>Standards</i>
Legalism	LESS	MORE
Attitudinalism	SAME	SAME
Combined Empirical	MORE	LESS

Because it utilizes the most recent research on the subject, our particular hypotheses will be drawn from the Combined Empirical Model.

These hypotheses will need more flesh than the rather barebones information given thus far, but further detail cannot easily be added without first describing the instrument that we used to test which of the competing models receives empirical support.

Before doing so, we return briefly to the methodological issues that began this Part. As discussed, the popular solutions to the comparison problem are not well-suited to a study of the differential impact of legal argument on rules and standards. To test this directly, we need to hold the facts of the case constant while varying whether legal argument is present and whether a rule or a standard applies to that case. Furthermore, it would be best to have a way to monitor both the direction and strength of ideological passion in the precise case being considered. Experimental simulation can provide uniformity of legal norms, case facts, judicial motivation, legal precedent, and party argumentation that is elusive in actual legal systems. This will

84. This assumes constraining, rather than assisting, rules. See Sheppard, *supra* note 32.

allow the best possible isolation of the interaction between legal argument and type of legal norm content. And while it is not perfect—this is a simulation, after all—steps can be taken to increase the likelihood that the findings of the lab are valid externally as well. We will describe those measures in the following Part.

III. TESTING METHODS AND HYPOTHESES

A. *Experimental Design*

The experiment at the center of this study is a modified design of the experiment implemented in our last study, a 2x2 (argument/no argument and rule/standard).⁸⁵ Thus, many of its characteristics have already been validated. For example, the fact pattern, incentives structure, and many of the variables are nearly identical. This similarity allows for greater internal validity, as the instrument has already been tested, and allows for an analysis of reliability.

1. *Participants and Design*

This experiment asked law students and law school graduates from the last two years to serve as mock judges in a simulated case. It was important for the fact pattern to be ideologically salient and divisive so that subjects would care about the result and so that subjects on one side of the ideological divide would feel pressure not to apply the law in a straightforward direction.⁸⁶ In other words, the experiment was designed to set up the conditions for legal *constraint*. We wanted to test whether law makes a difference when the decisionmaker would prefer it not to. The fact pattern read as follows:

A citizen of a foreign nation (“the alien”) has legally entered our country on August 1, 2007 with a valid 1-year work visa issued that same day. He fled his home country after being persecuted for his activism on behalf of the poor and his anti-establishment political opinion. He had been imprisoned for his political protests briefly in 2006, and he and his family had been threatened by the local police force. Worried for his personal safety, he obtained the visa and arrived here. He could not speak English and was largely ignorant of our laws regarding asylum, which is the mechanism our country uses to allow aliens to reside here who have been or fear being persecuted on account of their race, religion, nationality, membership in a social group, or political opinion. He began working in a restaurant shortly after his arrival, but his employer

85. Sheppard, *supra* note 32, at 966.

86. See PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS & PEW HISPANIC CTR., NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES: AMERICA’S IMMIGRATION QUANDRY 9 (2006), available at <http://www.pewhispanic.org/files/reports/63.pdf> (showing roughly even distribution nationally of those that believe immigration is a very big problem, a moderately big problem, a small problem, and not a problem at all).

never asked him to show documentation indicating that he was a legal worker. He was paid under-the-table. On July 31, 2008, his visa expired. He continued to work at the restaurant, however, receiving pay as usual for the next 13 months. At that point, a new employee began work at the same restaurant. The new employee soon learned of the alien's experiences in his home country and of his expired one-year visa. The new employee explained to the alien that staying here after the expiration of the visa was illegal but that he might qualify for asylum on the ground of past persecution for political opinion. She suggested that the alien file a petition for asylum. The alien retained a lawyer and filed a petition about 4 weeks later on September 25, 2009. If granted asylum, the alien will have the legal right to live here indefinitely. If denied asylum, he will be removed from our country and transported back to the country of his citizenship.

This fact pattern was a constant in the experiment, appearing every time subjects were asked to engage in a decision as to the merits of the case.

The other noteworthy constant in the design is the incentives structure. In an effort to make the judging scenario mimic real life, there are two important motivations that must be tapped into: (1) the motivation to write a convincing justification for a decision; and (2) the motivation to reach the result that you personally favor. The first is often felt by judges as pressure to make their decisionmaking conform to extant binding legal authority. The second is a moral, social, personal, or ideological pressure to make sure that the consequences of the decision are consistent with the values of the respective normative system.

As for the motivation to follow the law, the main challenge was to get subjects to feel bound by the simulated law and to feel compelled to make a concerted effort in applying it and justifying their application. To meet this challenge, subjects were told that they would have the opportunity to be entered in a contingent lottery. The contingency was as follows: if subjects can convince one of two colleagues that the subjects have adequately justified their result, they are eligible to win a random drawing with a \$300 prize. Subjects were told to write only until they felt that they have written a convincing justification. This served to increase the likelihood that students were motivated to put in effort and seek to write a decision that meets the demands of actual judging.

As for the motivation to bring about consequences that they care about, the biggest challenge was to get the subjects to feel as though their decisions had actual stakes—no small feat in a fake case. To meet this challenge, we told subjects that their decision would result in the payment of \$75 to actual charitable organizations whose mission was consistent with the result they choose if they won the

lottery.⁸⁷ More specifically, we told them that a decision to grant asylum would result in payment to Grantmakers Concerned with Immigrants and Refugees, a non-profit and pro-immigration organization.⁸⁸ On the other hand, a decision to deny asylum would result in a payment to the Federation for American Immigration Reform, a non-profit organization that is critical of current immigration policies.⁸⁹ While these stakes are lower than if this case described a real immigration hearing, they are large enough for students to care about the real-world consequences of the decision that they are asked to render and therefore make the experiment more representative of actual judging.⁹⁰ In effect, these measures tie fictional outcomes to the advancement of real world ideologies.

Having discussed what remains constant between conditions, it is now time to turn to what changes. The most important change that occurs during the treatment (or “law”) phase is that the fact pattern is supplemented with either law or law and argument.

Thus, the experiment had three variables and two observation periods. The two main variables were exposures to law and exposure to argumentation. Each subject completed two phases, which were in random order and both of which were completed online during the same session. The phases are distinguished by whether subjects were exposed to a potentially dispositive law; in one phase they were (the “law phase”) and in the other they were not (the “baseline phase”). All subjects receive the same baseline condition—the aforementioned immigration fact pattern presenting a choice of whether to grant or deny asylum—but we randomized the order in which subjects were exposed to the two phases.⁹¹ The two-phase design isolates legal effect by allowing us to compare a subject’s decisionmaking when

87. Note that this is a slight difference with our previous study in which subjects sent \$2 to each organization regardless of whether they won the lottery. This was a cheaper way to set the incentive, and it was easier for the subjects to understand, as it follows the same mechanism as the prize for convincingness.

88. GRANTMAKERS CONCERNED WITH IMMIGRANTS & REFUGEES, <http://www.gcir.org/about> (last visited Feb. 12, 2013).

89. FED’N FOR AM. IMMIGRATION REFORM, <http://www.fairus.org/site/PageNavigator/about/> (last visited Feb. 12, 2013).

90. Indeed, in a pilot, one subject refused to take part because he did not want to support an organization that he or she felt an ideological objection towards and the law would have, in his view, forced him or her to do so.

91. In the empirical literature, a condition labeled “baseline” would ordinarily occur before the treatment for each subject. *See, e.g.*, MOSBY’S MEDICAL DICTIONARY (8th ed. 2009) (defining baseline condition as “an environmental condition during which a particular behavior reflects a stable rate of response before the introduction of experimental or therapeutic conditions”). For our purposes in this Article, the label is appropriate because it captures the fact that our baseline measure is meant to reveal the stable preferences of the subjects in the absence of the experimental condition. *See ANNE MYERS & CHRISTINE H. HANSEN, EXPERIMENTAL PSYCHOLOGY* (7th ed. 2012) (defining baseline as “a measure of behavior as it normally occurs without the experimental manipulation; a control condition used to assess the impact of the experimental condition.”).

potentially dispositive law is present and when it is absent in the same case. Thus, this dimension of the experiment employs a “within subjects” design.

The law phase of the experiment further permits “between subjects” analysis; it allows for comparisons between different subject groups that have been divided along a handful of randomized experimental conditions. There were two experimental treatments, one comprising a pure law condition and another comprising a legal condition and a legal argument. The pure law treatment consisted of two factors: subjects received either a pure rule or a pure standard. The argument treatment also had two factors: subjects received a series of legal arguments in conjunction with either a pure rule or standard. Thus, the experiment has a factorial 2x2(x2) design⁹² as shown in Table 2.

Table 2: 2x2(x2) Design of Experiment’s Legal Norm and Argument Exposure

Rule	Standard
Rule + Argument	Standard + Argument

Thus, there were four experimental conditions in all, which represent the four possible combinations under the two treatments: pure legal norms (either rule or standard) and law plus argument (either rule plus argument or standard plus argument). Using this approach, it was possible to isolate the effect of the presence of argument on rules and on standards.

The random order variable deserves additional mention, although it is not something that figures prominently in this particular study: order was randomized. Thus, some subjects received the baseline phase first and others received the law phase first. In a separate study, we will focus on how the order in which one is exposed to a

92. As a technical matter, the experiment is a 2x2(x2) with the last variable as order of exposure: some subjects received the baseline phase first and others received the law phase first. Because order is a covariate, however, we will refer to the experiment as a 2x2.

legal issue affects decisionmaking and ideology or personal preference. Because we expect that order will affect decisionmaking, we will report some results for subjects in both the normal order (baseline first) and in reverse order (law first).

2. *The Independent Variables in Detail*

It is important for a study that considers the differential effect of rules and standards to make every effort to have the norms used in the simulation be pure, paradigmatic representations of each type, which involves controlling for outside effects of related laws, and that they regulate the same conduct.⁹³ Both aspects are satisfied here. In addition, we supplement rules or standards with argument for half of the subject groups, and the format of the arguments requires a bit of discussion. In the following Part, we detail each variable.

The Legal Rule: As discussed, the paradigm example of a legal rule commands compliance with a bright-line term. In our study, the judge is subject to a mandatory bright-line legal rule that is representative of actual legal norms of that sort in the real world. In particular, it provides a specific time deadline for filing asylum applications after the expiration of the visa, which the immigrant has not met. A plain reading of the rule would permit a simple deductive solution—namely, all successful applications for asylum must file before the deadline, the immigrant here did not file before the deadline, and therefore he is not a successful applicant. Other outcomes would more difficult to reach, so the resource restriction described below should prevent some subjects from reaching other outcomes. That is, it should take work to get to a different outcome.

The Legal Standard: As discussed, the paradigm legal standard conditions compliance upon an evaluative term.⁹⁴ Accordingly, the subject under a legal standard is subject to a law that requires immigrants to file asylum applications within a reasonable time after the expiration of the visa. Unlike the rule, it does not permit a simple deductive solution, and the lack of clarity should make it easy for the subject to reach the outcome that he or she prefers, which ought to be the same one that he or she chose or will choose in the baseline phase. The subject should be able to reach the same outcome as in the baseline phase regardless of the resource restriction described below.

93. Scholars believe that any individual law can be placed somewhere on a continuum between the constraining pole of pure rules and the discretionary pole of pure standards. See, e.g., Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM L. REV. 1, 49 (1997). Therefore, many laws fall somewhere between these poles, and their precise position can be debated. Thus, anyone attempting to test the constraining power of rules must endeavor to use pure or polar examples of rules, or else they risk the accusation that they have stacked the deck so as to limit their maximum power to constrain.

94. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-82 (1985).

The Legal Argument: The inspiration for the design of the legal argument variable was Wilson Huhn's THE FIVE TYPES OF LEGAL ARGUMENT. The book, a very popular textbook designed for instruction of new law students, is a perfect fit for an experiment of this type because it contains one of the clearest and most concise typologies of legal argument, because it makes claims about the circumstances under which each argument type ought to be most persuasive, and because it is the most familiar approach to legal argument for law students, who make up the subjects of my experiment.⁹⁵ Below, we provide Huhn's types as well as our examples of each for each side of the argument.

PRECEDENT

Pro-Asylum: In *Ef v. Gov* (2001), the federal appeals court upheld the acceptance of a prisoner's brief even though it was filed eight months after the deadline because the prisoner was representing himself without a lawyer and because the denial would have resulted in the serious consequence of life imprisonment.

Anti-Asylum: In *Cee v. Bee* (2001), the federal appeals court upheld the lower court's dismissal of a complaint arising out of a slip and fall at a government facility. The complaint was filed eight months after the lapse of the statute of limitations period due to the plaintiff's ignorance of the deadline.

TRADITION

Pro-Asylum: Traditionally, we have given courts the discretion to rely on equitable principles when the cold, straightforward application of the law would bring about unjust consequences, like forcing someone into political persecution or risk of death.

Anti-Asylum: Traditionally, countries have not allowed foreign visitors to remain when they have tried to hide from the government while within their borders. This is particularly true when the person hiding has decided to accept benefits that the country provides without paying the costs that they would have paid if they weren't hiding.

95. See HUHNS, *supra* note 4; see also *Wilson R. Huhn Receives the 2012 Scholar of the Year Award*, UAKRON.EDU (May 22, 2012), <http://www.uakron.edu/law/news/news-details.dot?newsId=cbc695ef-15de-4128-88c6-065ac27042e1>.

TEXT

Pro-Asylum: The text of the document does not specify a penalty, leaving to the judge discretion to choose an appropriate one, which is to grant asylum despite the lateness.

Anti-Asylum: Following the text of the asylum filing law, the outcome here is clear: the alien ought to be denied asylum for missing the deadline.

LEGISLATIVE INTENT

Pro-Asylum: We can infer that the legislature introduced this deadline to ensure that the evidence in favor of or against granting asylum does not grow stale. The asylum law itself was created out of concerns for basic human fairness, not to disproportionately penalize.

Anti-Asylum: We can infer that, by introducing this law, the legislature intended to curb the number of aliens that have abused the system by staying in the country for as long as they want before facing the scrutiny of the courts.

PUBLIC POLICY

Pro-Asylum: The periods of greatest economic growth in this country coincide with periods of open immigration. Here, denying asylum in cases like this robs us of productive workers; whereas granting asylum allows us to monitor and tax more people.

Anti-Asylum: Allowing aliens to escape legal scrutiny indefinitely by not imposing strict deadlines for filing allows them to occupy jobs that legal aliens or citizens could have. As a result, respect for law goes down and unemployment goes up.

Offering an array of arguments serves multiple purposes. First, it allows us to increase the validity of the simulation. In actual cases, litigants raise numerous arguments, and typically these arguments fall into several types. Second, it permits us to test which argument type is most persuasive under different circumstances. While this was not our focus here, future projects could rely on this testing instrument and arrive at novel findings regarding the best fit between argument type and case type.

It might be wondered why the arguments are evenly paired. We considered presenting arguments for only one side or having more arguments for one side or the other. Such a design would make this project align more closely to existing studies of amicus brief influ-

ence, in which authors found that more amicus arguments for one side made judges more likely to favor that side or with studies of the influence of attorney quality.⁹⁶ In the end, however, we resisted doing so for a few reasons. First, this study is designed to shed light, not only on the question of how legal argument influences decisionmaking, but also on the more fundamental question of whether it influences decisionmaking at all. Were we to make the argument on one side considerably more sophisticated than the other, we would arguably be stacking the deck in favor of bringing about legal influence in that direction, thus minimizing the impact of finding influence. Secondly, the introduction of yet another variable into the experiment would have made the number of subjects necessary to obtain power far too high. Thirdly, obviously unbalanced argumentation could harm external validity. Subjects might perceive the unbalance as something of a game hint—that is, they might conclude that the obvious difference in quality is a signal that they are supposed to find for the side with superior argumentation to win the prize. Accordingly, we chose to make the arguments evenly matched. Lastly, we can still see whether judges are crediting counter-ideological arguments even without unbalanced argumentation.

3. *The Dependent Variables*

Simply put, the dependent variables attempt to capture important aspects of decisionmaking in the presence of law and in its absence.

In both the baseline and law phases of the experiment, the subjects review the fact pattern. Thereafter, the subjects are asked a series of questions from which we collected data. First, they were asked to decide whether or not to grant asylum (although, as described below, the role the subject plays is different between phases). This variable will be called “baseline decision” for the baseline phase or “law decision” for the law phase. This allows us to know the outcome of the case that they favor under the conditions that they have been exposed to. Having made their choice as to the correct outcome in their baseline or law decisions, they were asked to note the strength of their conviction that their answer was right on a numbered, 1-10 Likert Scale.⁹⁷ This score will be called “baseline satisfaction” or “law satisfaction” depending on the phase. Lastly, they were asked to

96. See COLLINS, *supra* note 49, at 109-10.

97. A Likert scale is a psychometric scale often used in questionnaires, presenting examinees with ordinal choices (for example, a 1-7 scale paired with a statement, 1 meaning total disagreement and 7 meaning total agreement). See ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 172 (2010); see, e.g., Maya Israel & Andrew Moshirnia, *Interacting and Learning Together: Factors Influencing Preservice Teachers' Perceptions of Academic Wiki Use*, 20 J. TECH. & TCHR. EDUC. 151, 160 (2012).

write a justification for their decision. The justification allows the subjects to work out their decision, forcing the subjects to deliberate and consider their incentives and thereby making the experiment more valid. Thus, the duplicated variables are the subjects' decisions and their levels of satisfaction.⁹⁸

B. Hypotheses

Now that that basic mechanics of the experiment are clear, it is possible to articulate our specific hypotheses. There are certainly more hypotheses than those included below, but these address the primary indicators of legal constraint and its relationship with legal argumentation.

Before beginning, it is important to restate what we mean by "constraint." Constraint occurs when a judge follows the law's directive despite the fact that, in the absence of law, the judge would have chosen differently.⁹⁹ Because legal constraint is an important factor in the model of legal argument effect, we chose to design the legal directive so as to maximize the likelihood that they would point in a direction that conflicts with what subjects would chose in the baseline phase. In short, the rule straightforwardly points towards denying asylum.¹⁰⁰ Thus, when we refer to "constrainable" subjects, we mean those that chose to grant asylum in the baseline phase.

As a threshold matter, we tested basic hypotheses regarding the differential effect of rules and standards on legal constraint.¹⁰¹

Hypothesis 1: Subjects who receive rules will be more constrained (higher decision change rates and lower satisfaction scores) than subjects who receive standards.

98. In addition, at the end of the law phase, subjects were also asked to prioritize the persuasiveness of each of the arguments provided by the parties, indicating by ordinal rank the order of priority. Subjects were first asked to rank the persuasiveness of each argument in support of the position they advanced in their judicial decisions. Thereafter, they were asked to rank the persuasiveness of the arguments against their positions. We included the rank dependent variable in anticipation that we would be able to use the results in a separate study on the effects of various *kinds* of legal argument. Since that project is ongoing and it is not our focus here, we do not discuss those results in this Article.

99. See Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 779 (2010) (describing constraint in similar terms).

100. Just because this is the most straightforward interpretation of the rule does not mean that it is the legally correct interpretation, of course. We wish to avoid staking a position in the debate about whether law admits of single, legally correct answers in the majority of cases.

101. These hypotheses generally concerned the likelihood that the presence of law would force subjects to depart from the position they adopted in the baseline phase, and the likelihood that these same factors would change strengths of conviction.

A handful of scholars have tested the differential effects of rules and standards and found evidence that rules are more constraining.¹⁰² Our first goal is to test whether this experiment duplicates those results.

Hypothesis 2: The higher a subject's satisfaction in the baseline phase the less likely the subject will have chosen differently between the two phases.

The strength of baseline satisfaction is a key component both of whether legal constraint will occur and whether legal argument is likely to have an impact. In both cases, we predict that the strength of ideological or personal preferences (as measured by baseline satisfaction) will work against the likelihood that law will constrain. In the case of legal argument, strength is doubly important: because we expect that, in the typical case, the judge will view legal argument as a useful tool for engaging in work, those that have strong ideological or personal desires to engage in work will likewise be more likely to use legal argument to enhance their ability to complete work.

Hypothesis 3: Subjects who receive argument will show lower constraint scores (lower decision change rates, higher law confidence) than subjects who receive no argument.

Because arguments are tools that help judges as they engage in work, we can expect that the judges will be less constrained under the argument condition overall. This effect, however, ought to be much more pronounced under the rule condition because we do not expect a significant effect under the standard condition, which is the hypothesis that follows.

Hypothesis 4: There will be significantly fewer constrained subjects under the argument and rule condition than under the rule condition, and there will not be a significant difference in the number of constrained subjects between the argument and standard condition and the standard condition.

This reflects the Combined Empirical Model, which characterizes legal arguments as tools to make work easier for the ideologically or personally motivated judge, but which respects the fact that work is made more or less difficult by the constraining power of the norm content in the law.

IV. RESULTS

A total of 217 subjects (N = 217) successfully completed the experiment. The subjects represented every year of law school (first, second,

102. See Cox & Miles, *supra* note 33, at 1494; Feldman & Harel, *supra* note 33, at 87; Sheppard & Cushman, *supra* note 33, at 80; Sheppard, *supra* note 32, at 980.

and third year students) as well as graduates from up to two years prior. Statistical analysis of difference scores on our two primary dependent variables (decision and satisfaction) did not show any significant difference between graduates and law students.

Before discussing the results it is necessary to briefly mention two aspects of the testing instrument that performed unexpectedly. First, for unknown reasons, no data was collected for strength of conviction during the baseline phase for one of the eight subgroups. This reduced the power of the experiment as it related to within subjects comparisons, but the main effects of the variables were pronounced enough to overcome that hurdle. Second, the randomizing function did not create evenly sized groups; this contributed to a lack of uniformity on the baseline decision means among the groups.¹⁰³ As a result, the following analysis also includes difference scores for decision rather than simple means for decisions for each group.

The following table (Table 3) sets forth the basic descriptive statistics, which will be discussed with particularity below.

103. The four groups (Rule, Standard, Rule Argument, and Standard Argument) exhibited significantly different baseline decision refusal rates (6%, 21%, 21%, and 2%, respectively) before exposure to any variables indicating that randomization did not ensure equalized groups. We ran a 3X3 multivariate analysis of variance (MANOVA), with type of law, exposure to argument, and order as the independent variables, and with baseline decision and baseline conviction as the dependent variables. The multivariate test returned a significant result for argument's effect on baseline decision $F(1, 209) = 2.88, p = .091$. However, these subjects had not yet been exposed to argument. To determine if the normal order groups were significantly different before exposure to experimental conditions, we ran a post hoc comparison of only the normal order groups. This test used the Sidak correction to control for type I error. See Herve Abdi, *The Bonferonni and Sidak Corrections of Multiple Comparisons*, in 1 *ENCYCLOPEDIA OF MEASUREMENT AND STATISTICS* (Neil Salkind ed., 2007). The pairwise comparisons revealed a significant difference in the moral decision between several of the groups. The Standard Argument group ($m = 1.02, SE = .05$) was significantly different from the Standard Only group ($m = 1.21, SE = .05, p = .01$) and the Rule Argument group ($m = -1.21, SE = .06, p = .02$).

Table 3: Descriptive Statistics Summary

<i>Treatment</i>	<i>N</i>	<i>Baseline Phase Denial Rate & Conviction (Std. Dev.)</i>	<i>Law Phase Denial Rate & Conviction (Std. Dev.)</i>	<i>Change (Law Phase Minus Baseline)</i>
Standard	59	22% 7.63 (1.75)	32% 7.63 (1.71)	10% .00
Standard & Argument	69	9% 7.82 (1.50)	20% 7.60 (1.84)	11% .22
Rule	43	16% 7.17 (2.06)	51% 6.77 (2.32)	35% .40
Rule & Argument	46 ¹⁰⁴	13% 7.86 (1.50)	22% 6.89 (2.22)	9% .63

We then ran a 3x3 Manova, with type of law, exposure to argument, and order as the independent variables, and with the difference score for decisions (baseline decision – law decision), law decision, and law satisfaction as the dependent variables.

The multivariate test returned significant results for all three variables, as well as all interactions except between type of legal norm content (rule or standard) and order. Due to the significant multivariate test results, between subjects test results for all hypotheses were examined.¹⁰⁵

Hypothesis 1: Subjects who receive rules will be more constrained (higher decision change rates and lower law satisfaction scores) than subjects who receive standards.

We hypothesized that due to the rigidity of rules and relative flexibility of standards, subjects who received rules would be more likely

104. Note: conviction data exists for only 28 subjects.

105. It bears mentioning that subjects who took the experiment in reverse order were less likely to show a difference in their two decisions and had higher law satisfaction scores than did subjects who took the experiment in normal order. While these results provide an interesting window into anchoring in judging, a full discussion of our order hypotheses is outside of the scope of this Article.

to exhibit legal constraint than subjects who received standards. As explained earlier, constraint is measured by the number of subjects who granted asylum in the moral or baseline phase but denied asylum during the law phase. A subject may also show constraint¹⁰⁶ by expressing a lower conviction in the law phase result. Subjects in the rule groups showed significantly higher decision rate changes here ($F = 4.32$, $p = .04$, *partial* $\eta^2 = .020$). In particular, there was a 21.4% increase for those under rules but a 10% denial increase for those under standards. In addition, rule groups showed higher law decision denial rates ($F = 3.66$, $p = .06$, *partial* $\eta^2 = .017$). Rule groups had a law decision rate of 1.26 versus 1.38 for standard groups. Lastly, rule groups had lower law satisfaction scores ($F = 33.08$, $p < .01$, *partial* $\eta^2 = .039$), scoring 6.9 versus 7.7 for those under standards. Further data is set forth in Table 4 below.

Table 4: Rule Constraint Versus Standard Constraint as Measured by Mean Law Decision, Mean Law Satisfaction, and Percentage Increase in Denials

<i>Type of Law</i>	<i>N</i>	<i>Mean Law Decision Rate</i>	<i>Percentage Increase in Denials in Law Phase</i>	<i>Mean Law Satisfaction (Std. Dev.)</i>
Standard	128	1.26*	10%**	7.66*** (.178)
Rule	89	1.38	21.5%	6.85 (.214)

*Significant at $p < .1$, **Significant at $p < .05$, ***Significant at $p < .01$

Hypothesis 2: The higher a subject's baseline satisfaction, the less likely the subject will have chosen differently between the two phases.

Our earlier constraint analysis assumes that preferences are constant—that is, subjects who chose to grant asylum in the baseline phase would prefer to grant asylum in the law phase. But of course, some subjects will be indifferent to these outcomes in spite of the

106. When this drop in conviction is not accompanied by a change in outcome between the baseline and law phases, then it is fair to say that the underlying constraint is not as complete as when it does create such a change in outcome. Nevertheless, even if this constraint is partial, it indicates that the norm has exerted an influence on the deliberation of the judge.

real-world consequences built into our model. To provide a more detailed picture of observed legal constraint and to increase the validity of our results, we also asked subjects to report their strength of conviction in their decisions. If subjects were accurately reporting their conviction, we would expect that subjects with lower conviction scores in the baseline phase would be more likely to change their positions in the law phase than would subjects with higher conviction scores.

Curve estimation using baseline satisfaction ($N = 197$) to predict likelihood of a change of decision between phases showed significant cubic ($F = 2.43, p = .07$) and quadratic relations ($F = 2.93, p = .06$).¹⁰⁷ Thus, the Likert scale of satisfaction proved predictive, although not at the lower end of the scale. As Graph 1 shows, a clear trend emerges for subjects that have a baseline satisfaction of five or greater in the baseline phase: generally, the higher subjects' satisfaction during the baseline phase, the less likely would they change their decision during the law phase in favor of denying asylum. We have placed a down-right line on the graph to indicate this trend. It is also apparent in Graph 1 that the vast majority of subjects are contained in that 5-10 range.¹⁰⁸

107. Interestingly, the relation was not linear. A look at the data revealed why: a handful of subjects that gave very low satisfaction scores in the baseline phase changed positions in the opposite way that one would expect (denying in baseline but granting in law phase). It is possible that they gave low scores simply because they did not feel very strongly about anything in the experiment, which might have affected effort and comprehension levels.

108. It might be argued that the reverse order subjects ($N = 101$), because they received the law condition first, might try to reverse engineer their baseline measures to conform with their law phase measures, thus making this relation somewhat artificial. Even considering only normal order subjects, however, the result is the same, cubic ($F = 2.99, p = .04$) and quadratic ($F = 3.91, p = .02$) as Table 5 shows:

Equation Type	R-Sq.	F
Cubic	.09	2.99**
Quadratic	.07	3.91**

**Significant at $p < .05$

Graph 1: Percentage of Constrained by Baseline Satisfaction (All Subjects)

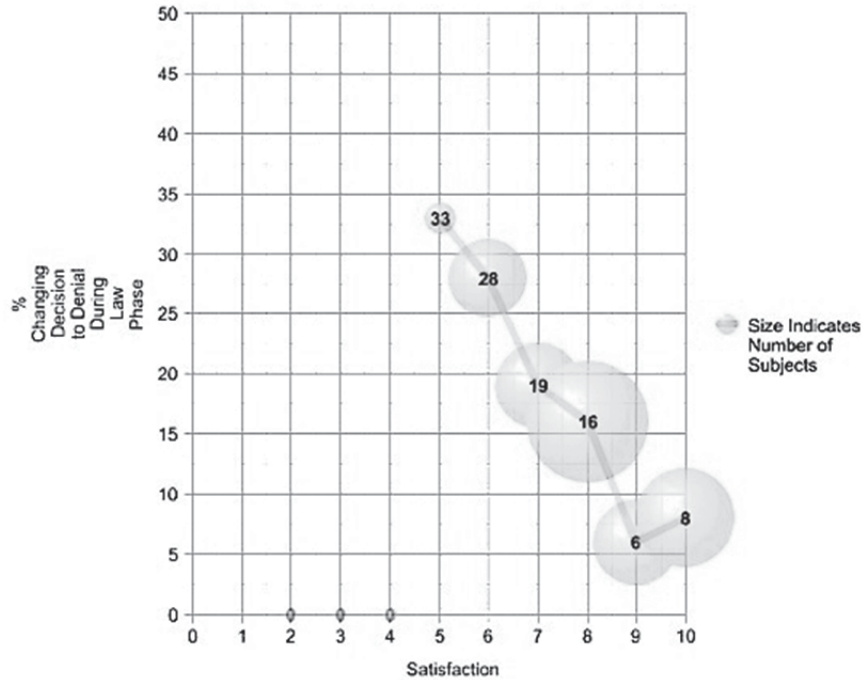


Table 5 provides further data.

Table 5: Regression Analysis: Independent Variable Baseline Satisfaction and Dependent Variable Change of Decision

Equation Type	R-Sq.	F
Cubic	.03	2.99*
Quadratic	.04	3.91*

*Significant at $p < .1$

If we look more closely at this relation by distinguishing rule groups from standard groups, we would expect that the relation would be more pronounced under rules than under standards; the former predictably put pressure on subjects to change positions whereas the latter do not. Indeed, this is true. A significant quadratic relation ($F = 2.94$, $p = .06$) emerges under rules but no significant relation emerges under standards. The following two Graphs (2 & 3) display this difference. Notice a similar down-right trend (drawn with a line) that emerges under rules in Graph 2.

Graph 2: Percentage of Constrained by Baseline Satisfaction (Rule Groups)

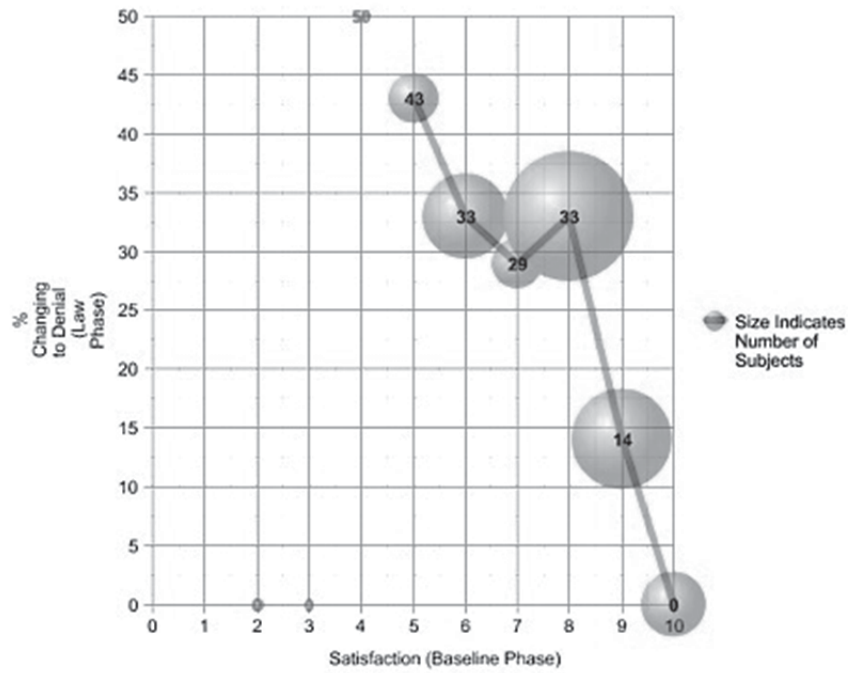


Table 5 provides further data.

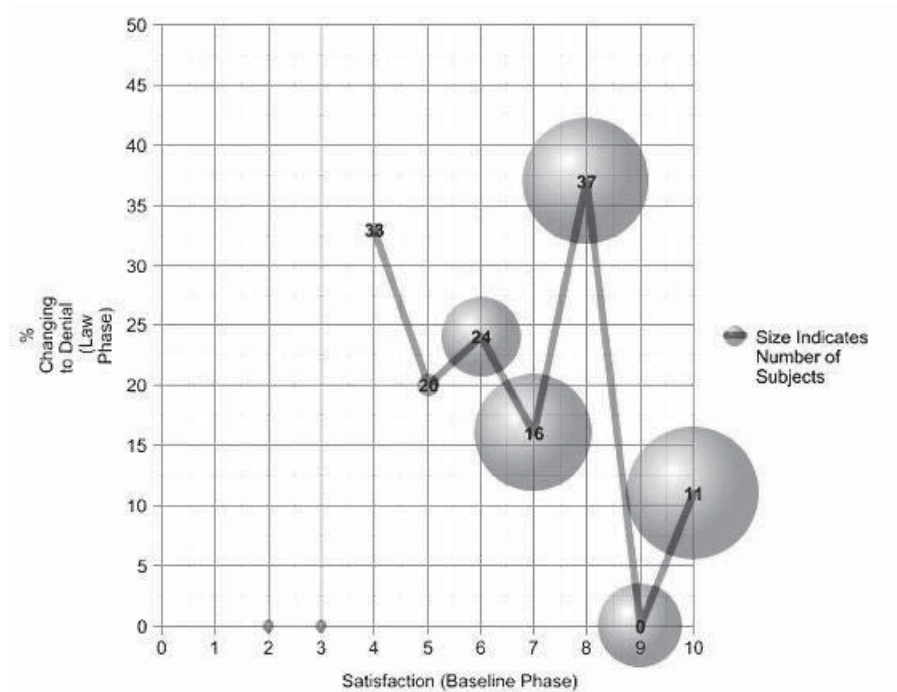
Table 5: Regression Analysis: Independent Variable Baseline Satisfaction and Dependent Variable Change of Decision (Rule Groups Only)

Equation Type	R-Sq.	F
Quadratic	.08	2.95*

*Significant at $p < .1$

No statistically significant trend emerges with the standard groups, as seen in Graph 3.

Graph 3: Percentage of Constrained by Baseline Satisfaction (Standard Groups)



Hypothesis 3: Subjects who receive argument will show lower constraint scores (lower decision change rates, higher law confidence) than subjects who receive no argument.

The results of hypotheses 1 and 2 indicate that subjects' preferences between phases are constant, that these preferences may be constrained by legal norms, and that the strength of a subject's preference is correlated to that subject's willingness to work to overcome the legal constraint. Within this framework, any tool that assists subjects in their desired task of overcoming a contrary legal norm should decrease constraint scores. Subjects in the argument groups did not show significant lower decision change rates ($N = 115$, Mean Increase in Denials = 11%) than subjects who received no argument ($N = 102$, Mean Increase in Denials = 20%, $f = 2.62$, $p = .11$, $partial \eta^2 = .012$).¹⁰⁹ However, the argument groups' law denial rates (24%) were significantly lower than groups which received no argument (41%, $f = 7.84$, $p < .01$, $partial \eta^2 = .036$). This finding allowed us to

109. Four ($N = 4$) standard argument subjects actually denied at the baseline and granted at the law phase.

proceed to analyze the effect by norm content type. Interestingly, though the argument groups had far fewer denials, they did not have significantly higher satisfaction scores. This information is summarized in the results table below.

<i>Exposure to Argument</i>	<i>N</i>	<i>Mean Law Decision Rate</i>	<i>Percentage Increase in Denials in Law Phase</i>	<i>Mean Law Satisfaction (Std. Dev.)</i>
No Argument	102	1.41*	20%	7.32 (.202)
Argument	115	1.24	11%	7.19 (.191)

*Significant at $p < .01$

Hypothesis 4: There will be significantly fewer constrained subjects under the argument and rule condition than under the rule condition, and there will not be a significant difference in the number of constrained subjects between the argument and standard condition and the standard condition.

Because rules pose a greater threat of constraint than standards (as shown in hypothesis 1) we would expect argument to have a larger effect size in the rule groups rather than the standards groups. A significant interaction was detected for type of law and exposure to argument in relation to likelihood of change in decision across phases ($F = 6.170$, $p = .014$, *partial* $\eta^2 = .029$). Subjects who received rules were much less likely to have differing decisions if they also received argument. However, argument had no significant effect on subjects who received standards. Table 7 provides further data:

Table 7: Interaction Between Presence of Argument and Type of Legal Norm Content (Rule vs. Standard) on Change of Decision

<i>Dep. Var.</i>	<i>df</i>	<i>Mean Square</i>	<i>F</i>	<i>Sig.</i>	<i>Partial Eta Squared</i>
Change of Decision	1, 216	.956	6.170	.014	.029

This difference is most pronounced when results broken down by group as in Table 8 and Table 9.

Table 8: Mean Increase in Denials by Presence of Argument and Type of Legal Norm

	No Argument	Argument
Standard	10%	11%
Rule	35%**	9%

**Significantly different from all other groups at $p < .05$, post hoc with Sidak correction factor.

Table 9: Law Denial Rate Estimate Marginal Means by Presence of Argument and Type of Legal Norm

	No Argument	Argument
Standard	1.30	1.22
Rule	1.52**	1.25

**Significantly different from Standard Argument and Rule Argument groups at $p < .05$, post hoc with Sidak correction factor.

V. ANALYSIS: RESULTS, LIMITATIONS, AVENUES FOR FURTHER STUDY, AND IMPLICATIONS

In this Part, we interpret the results, focusing first on how they relate to our hypotheses and then expanding outward to their implications for future empirical endeavor and for society in general.

A. *Analysis of Results*

At the outset, it is important to begin by noting that we have replicated the fundamental findings of previous studies.¹¹⁰ In particular, there is considerable support that our basic intuitions about the differential constraining power of rules and standards are true. That is, the experiment provided evidence that the rule constrained more than the standard did. Moreover, as expected, the likelihood of constraint was significantly related to the strength of one's satisfaction that a particular result ought to be brought about in the absence of law. These results, like those pertaining to the within subjects hypotheses, ought to increase our confidence in the internal validity of this testing instrument: both dependent variables provide useful information and the instrument as a whole is capable of reproducing past results. Furthermore, similar results have been achieved through other empirical methodologies.¹¹¹

More specifically, rules appear to be significantly more constraining than standards, with a denial rate 22% higher during the law phase than during the baseline phase, compared to a denial rate 10% higher during the law phase than during the baseline phase for the standard. Though it should be noted that neither norm appeared to constrain a majority of subjects overall. Of philosophical interest, however, is the fact that standards did produce significant constraint when considering all conditions, albeit less than the constraint produced by rules. Thus, even the reasonableness standard used here—which is about as pure a standard as one will likely encounter in the law¹¹²—did not simply reduce to an all-things-considered determination, the very determination subjects were asked to do during the baseline phase.

The constraint differential between rules and standards is important because it supports the notion that the content of the law that bears on the dispute before the judge frames the level of effort that the judge will have to put forth if she chooses to seek an ideologically or personally pleasing result. It would be fair to characterize

110. See sources cited *supra* notes 33-34.

111. See sources cited *supra* note 102.

112. Our standard did not exist in the presence of many factors that are believed to be responsible for “rulification” of standards, making them less evaluative and, thus, more rule-like over time. For instance, our simulation omitted factors such as numerous applications of cases involving similar facts under the same law, a network of germane statutory rules, and a clear background morality to the legal system. See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 491 (2000) (“As the Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases, by nature, are disputes that involve particular facts. As the cases are decided they become examples of what, as a concrete matter, the Standard means.”); Schauer, *supra* note 37, at 803-05.

this as the Legalist component of the relationship legal argument plays in legal constraint. Rules, it would appear from the data, possess stronger constraining power, but legal argument can lessen that power under certain circumstances, which would undercut the extreme Attitudinalist model of judging.

By elucidating these circumstances, however, it becomes clear that mainstream Critical accounts of legal argument effect also receive support—particularly, the claim that ideology is the engine behind a judge’s efforts to get around clear rules and to their resort to legal argumentation.

1. *The Strength of Subjects’ Preferences Mattered*

Statistical analysis revealed that, consistent with mainstream Critical accounts of judging, the more ideologically passionate the subject, the more likely it is that the subject will decide for an ideologically preferable result. And consistent with mainstream Attitudinalism, a subset of these subjects reached ideologically or personally favored results despite a straightforward rule to the contrary. Thus, knowing the direction and strength of a subject’s satisfaction in the baseline phase helps us predict how that subject will decide during the law phase.

This finding parallels the result in many of the Supreme Court argument studies that salience matters—specifically, that the Court is more likely to stick to its ideological guns in salient cases.¹¹³ As discussed, salience is a proxy for the Supreme Court’s ideological familiarity with and passion for the outcomes of the cases they consider, much like satisfaction was for our subjects.¹¹⁴ Thus, we suspect that the justices that feel more strongly about their preferred outcome are more likely to reach that outcome.

One distinction in our study, however, was that ideological or personal influence was most pronounced for only a subsection of our cases. Indeed, subjects under standards were most likely to let their baseline preferences dictate their decisions during the law phase. The differences under the legal argument condition were also smaller for subjects in standard groups. Thus, there is evidence that ideology mattered most during the law phase when the law was indeterminate. Most empirical studies of judging do not consider the level of indeterminacy of the laws before the judges, including the aforementioned studies of legal argument before the Supreme Court. The question we ought to ask is why the subjects who were in the standard groups in our simulation behaved most like Supreme Court justices in salient cases.

113. See Collins, *supra* note 39; McAtee & McGuire, *supra* note 39.

114. See discussion *supra* Part II.B.2.

One explanation is that there is a similar level of indeterminacy between the issues the Supreme Court faces and the issue that the subjects in the standard group considered. Numerous scholars have claimed that a higher proportion of the legal issues before the Supreme Court are, or are perceived by the judges to be,¹¹⁵ indeterminate.¹¹⁶ Such legal openness makes the issue before the justice take on a standard-like character, lessening the pressure on justices to go against their ideology and, as will be discussed again below, to seek the tools of argument.

There is even evidence that salient cases have a higher proportion of indeterminate issues than do other Supreme Court cases. A recent study supports the notion that salience increases the likelihood of plurality decisions to the same extent as do other indicators of indeterminacy, such as lower court dissensus and the presence of a constitutional or a civil rights issue.¹¹⁷

Thus, this study provides evidence that judges pursue the outcomes that they favor in the absence of law, and they are more successful in reaching those outcomes under conditions of legal indeterminacy.

2. *Subjects Used Argument Instrumentally*

Across all conditions, the presence of legal argumentation reduced the likelihood that denials of asylum would occur despite the fact that the arguments were evenly balanced for each side. Because most of our subjects favored granting asylum in the baseline, it is unsurprising that they were more likely to side with granting asylum during the law condition when there were arguments to that effect present, indifferent to the additional presence of arguments going the other direction of generally equal weight. In other words, the presence of balanced argument appears to produce an asymmetrical effect

115. See, e.g., Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644 (2003) (footnotes omitted) (“Most significantly, the Supreme Court’s docket consists of many more ‘very hard’ cases than do those of the lower appellate courts. The majority of the cases in the circuit courts admit of a right or a best answer and do not require the exercise of discretion. Lower appellate courts are thus constrained far more than the Supreme Court.”).

116. The empirical studies upon which we are relying consider only written decisions of the Supreme Court. See, e.g., Collins, *supra* note 39. Lawrence Solum points out that the Supreme Court makes many, many more decisions that are straightforward. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1742 (1988) (“During last term, the Court had 4,339 cases on its docket. Only 175 of these cases resulted in written opinions, and 102 of these were decided by per curiam or memorandum decisions. The thesis that the Court is presented only with hard cases finds its strongest support in the large number of 5-4 decisions by the Court; there were 45 last term. Surely these are hard cases. More troubling for this thesis is the only marginally smaller number of unanimous decisions.”).

117. See Corley et al., *supra* note 65, at 192-94.

in the direction that the judges preferred. A plausible¹¹⁸ explanation of this statistic is that the subjects, consciously or not, read the arguments in a biased way, such that the arguments served to make it more likely that the subjects could justify a decision in that direction. That is, the presence of favorable argument, even when paired with an unfavorable argument, reduced the “work” of overcoming a constraining legal norm.

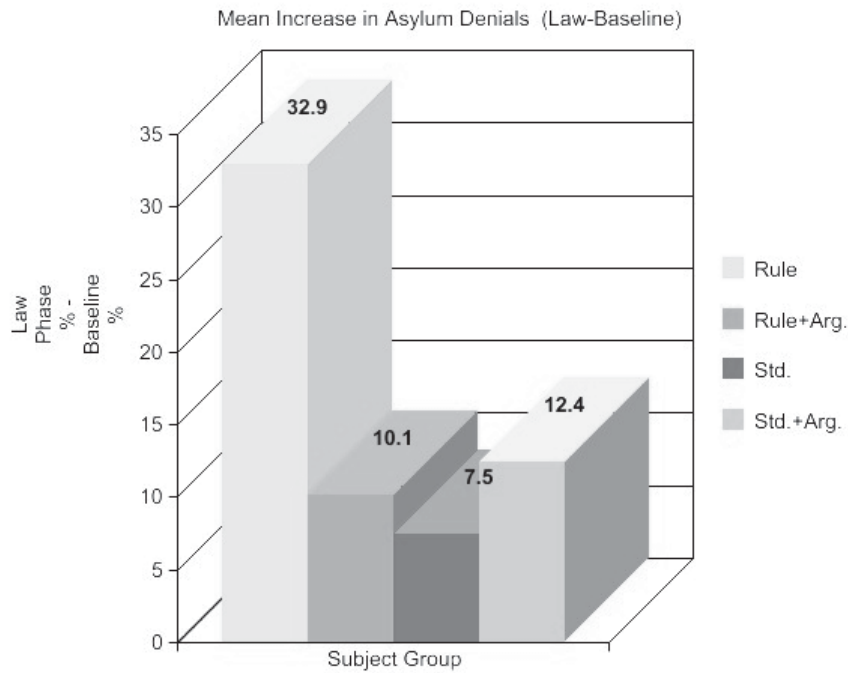
This asymmetrical effect was even more pronounced under the rule condition. There, the data supports that subjects were more likely to use the arguments on their preferred side as tools to pursue their own ends. Prior findings, including those from the same series of experiments that gave rise to this Article,¹¹⁹ provide evidence that rules put more pressure on subjects to conform to the directive that they deny asylum for late filings. The possibility that they are able to resist this pressure more effectively in the presence of argument supports the notion that they conceive of and/or treat argument as a helpful tool for reaching their preferred result of granting asylum.

This bar graph (Graph 4) helps visualize the interaction between the presence of argument and legal norm content type. Note that when the legal norm is a rule, the presence of argument leads the judges to stick to their ideological guns more often, as predicted. Standards do not exhibit this effect; to the contrary, there were more denials under the argument condition than under the pure standard, although this difference did not reach statistical significance.

118. Another possibility—albeit one that is less plausible due to the theoretical sophistication it presumes—is that the subjects did not consider the merits of the arguments in a biased way but rather saw in the arguments the same kind of openness in law that was described in Karl Llewellyn’s seminal article. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950). There, Llewellyn assembled popular canons of construction into conflicting pairs to illustrate how the canons fail to lend further constraining power to law in hard cases. *Id.* at 401-06. It is possible that by presenting our arguments in a similarly paired, conflicting fashion, subjects were reminded of their heartfelt, unbiased belief that the underlying, secondary materials of the law in complex legal systems display tremendous openness and opportunity for interpretation. As a result, they might have worked harder to seek adjudicative routes that were not straightforward and were more reflective of their moral views.

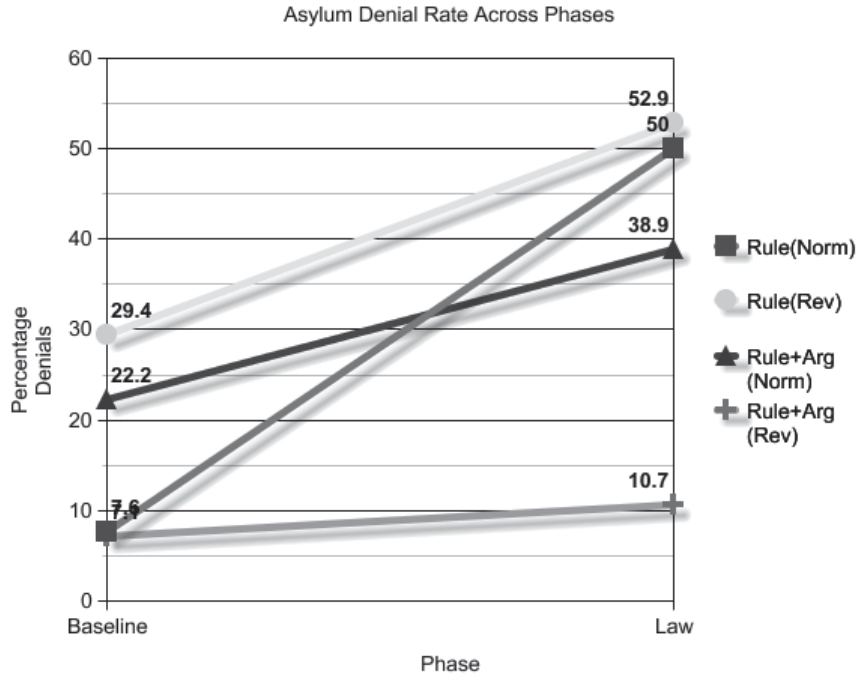
119. See Sheppard, *supra* note 32 (finding that time limitation enhanced constraining power of rules but not standards and surmising that this indicated that rules make working around straightforward directives of law more difficult than do standards).

Graph 4: Mean Increase in Asylum Denials (Law Phase Minus Baseline)



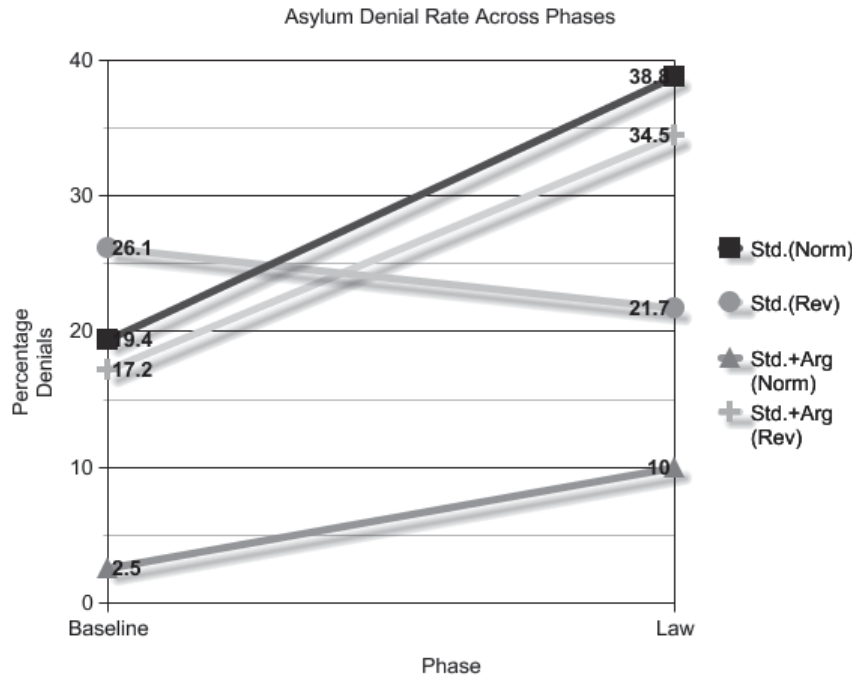
The following graph (Graph 5) shows how the rule argument groups, both normal and reverse order, experienced far fewer changes in decision than other groups. Note the two argument groups are more horizontal than the non-argument groups.

Graph 5: Asylum Denial Rate Across Phases (Rule Groups) (Norm = Normal Order, Rev = Reverse Order)



Compare this to the standards (Graph 6), where the argument groups and non-argument groups do not exhibit paired similar angles.

Graph 6: Asylum Denial Rate Across Phases (Standard Groups)
(Norm = Normal Order, Rev = Reverse Order)



This finding, too, shines a light on prior research. Corley's study of Supreme Court plagiarism provided evidence that, when there is compatibility between a justice's ideological preference and the result called for in an argument, it is more likely that the justice will use language from that brief in his or her legal opinion.¹²⁰ Furthermore, this propensity towards the instrumental use of legal argument occurred even in salient cases. Again, we find evidence of the instrumental use of legal argument, but unlike Corley, we connect its use to the level of difficulty that the law poses for the judge who seeks to reach a preferred result. Of course, even if Corley had chosen to study this dimension of adjudication, it is possible that the unique conditions of the Supreme Court minimize the effect of legal argument as a general matter regardless of the content of the individual laws that might apply to the Court's cases. For one, as discussed, the issues before the Supreme Court likely have a more standardized character;¹²¹ our study suggests that the effect of argument would be weakest in such situations. Compared to their lower court counterparts, Supreme Court justices likely feel less pressure from the law,

120. See Corley, *supra* note 52, at 476-77.

121. See discussion *supra* Part V.A.1.

itself, to reach conclusions that are at odds with their ideological preferences due to the fact that they face a higher proportion of hard cases. In turn, they might feel less pressure to rely upon the work of the advocates that appear before them. This pressure might further be reduced by the fact that Supreme Court justices have more time and resources to craft their opinions than do most other courts.¹²² As a result, it is possible that justices are better able to satisfy themselves that they can write convincing justifications in support of their determinations under their own steam than are lower court judges. Perhaps these factors simply make Corley's discovery of the prevalence of legal argument plagiarism at the Supreme Court all the more remarkable.

B. *Limitations and Avenues for Further Study*

This experiment tested a very narrow range of circumstances: a single fact-pattern and set of arguments under two different laws. Furthermore, the parameters were constricted so as to maximize the likelihood that the case could serve as a battleground for the two conflicting motivations of typical judges: the motivation to write convincing legal justifications and the motivation to have cases come out in an ideologically or personally preferred way.¹²³ The case at the heart of this simulation touched upon an ideologically divisive issue so that a cross-section of our subjects would feel motivated to fight against a straightforward, constraining rule.

It can be argued that such conflict is atypical, and if this can be demonstrated, that would surely limit the generalizability of these results. We agree that we must be careful to avoid placing more

122. Argument might be even further unnecessary in salient cases. When a case is salient, it is more likely that the justices care more about the case and, as a result, have already internally deliberated about the appropriate outcome, especially since the Court has the ability to spot issues that might come before them long before they arrive.

123. Duncan Kennedy's phenomenological account of judging is illuminating:

Suppose you approach me [as a judge] in my dark cloud of ignorance of whether or not I will be able to overcome the gap between the law and how-I-want-to-come-out. You argue that legal rules . . . *never* determine the outcome of a case. And since the legal rules are the only things that stand in the way of my coming out the way I want to come out, I have no problem.

. . . .

My experience with legal argument doesn't allow me to meet your jurisprudential position on its own ground. What I can say as legal arguer is that sometimes I come up against the rule as a felt objectivity, and can't budge it. This doesn't mean that I agree with it or that I think anyone would necessarily condemn me if I disregarded or changed it. All it means is that I say to myself, "Here's the rule that applies to this case;" "we all know that this is the rule;" and "here's how it applies;" and "Everyone is going to apply it that way."

Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 560-61 (1986).

weight on these findings than they can bear. It is also true, however, that a unique dimension of judging is that judges' primary motivations are so often in conflict. Judges want to reach the morally, personally or ideologically best result and they want to follow the law, and those interests are not in perfect alignment in a considerable number of cases. This experiment makes both of those interests tangible for our subjects through monetary rewards. Of course, judges do not always find themselves facing a conflict. Sometimes the law points in the desired direction. Sometimes the law is so vague that it does not seem to point in a single direction at all. But sometimes the judge must answer a difficult question: "Do I follow the straightforward dictates of the law, or do I work to identify a legal justification that supports the result I desire?" We sought to incorporate all of these scenarios into the experimental design: the first is under the rule condition for anti-asylum subjects, the second is under the standard, and the third is under the rule for pro-asylum subjects. Admittedly, we excluded the first category of subjects from our analysis.

Regarding the argument independent variable, it is unclear that this result would occur if legal argumentation were asymmetrically balanced in favor of the ideologically unpopular decision, such as when more amicus briefs are filed on one side.¹²⁴ The arguments here were symmetrical in number and weight. Thus, if it can be demonstrated that it is atypical for arguments to be balanced that would also limit the usefulness of this study. Similarly, it is unclear how our results would apply to cases in which there are asymmetries in the quality with which arguments are delivered. As a result, we do not believe that our findings threaten or support those reached in studies of attorney quality.

Regarding the law independent variable, numerous scholars have pointed out that rules and standards exist on a continuum, with legal norms that fall in between the two poles greatly outnumbering those at the ends.¹²⁵ A smaller number of scholars claim that pure rules and pure standards do not exist, but it is difficult to make sense of these claims.¹²⁶ The simulation here that we have described as a "pure"

124. See Collins, *supra* note 39.

125. See, e.g., Tun-Jen Chiang, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353, 1399 ("The fact that rules and standards exist on relative degrees of vagueness and complexity means that few laws are 'pure rules' or 'pure standards,' and that we can move from one to the other in degrees by adjusting their vagueness or their complexity.").

126. Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41, 42, 44 (2008) (stating, "[a]s already mentioned, there exists no pure rule or standard" although stating earlier in the article that "there exist almost no 'pure' rules and standards"); Michael Holley, *Making Credibility Determinations at Summary Judgment: How Judges Broaden Their Discretion While "Playing by the Rules,"* 20 WHITTIER L. REV. 865, 869 (1999) (footnote omitted) ("Much has been written about rules and standards, and definitions of both abound. Such definitions usually acknowledge that

rule—a legal norm whose content is maximally constraining—should not be mistaken for a situation in which there is a perfect rule—a legal norm whose content always constrains completely—which might not even exist. And the same goes for standards except with respect to discretion. A pure standard is maximally discretionary, but it is not yet known whether a standard can be perfectly discretionary. Such limitations are as true here as they are in the real world.

The hard question is whether the rules and standards in this simulation are unrealistically pure. In the real world, the circumstances are most ripe for purity when a piece of legislation is first promulgated in an uncongested legal field.¹²⁷ These circumstances can arise in a number of ways: they can come about because the new legislation is complete and operates to replace preexisting directives in the domain to which it applies (such as when a worker’s compensation table is issued), or because the directive represents the first time that the domain has been regulated (such as when states began regulating the de-leading of rental homes or the use of carbon monoxide detectors¹²⁸), or because the directive exists in a jurisdiction where there is little to no recognition of precedent (such as in civil law states or countries¹²⁹). It is certainly possible that actual legal norms possess the same purity as the norms used here, but it is nevertheless clear that this is not always, and probably not usually, the case.

Another considerable limitation is that the subjects probably had never before engaged in judicial decisionmaking on an issue of this sort before. All were young lawyers or law students. Further judicial or legal experience might affect the likelihood that real world judges would rely upon legal argument, or it might affect their passion for ideology, either of which could change effect sizes or eliminate effect altogether.

But does the bare fact that the subjects were not judges invalidate the results? We think not. Judges receive the majority of their formal training in law school.¹³⁰ Moreover, one of our lessons from existing empirical work is that judges are human—erroneous and prone to bias. In 1993, Richard Posner famously answered the question, “what

it is impossible to define one term without reference to the other, because pure rules and standards cannot be said to exist.”).

127. See *supra* note 112.

128. 2009 Colo. Sess. Laws 180.

129. See, e.g., *In re Orso*, 283 F.3d 686, 695 n.29 (5th Cir. 2002) (en banc) (describing lack of stare decisis in Louisiana).

130. See CHERYL THOMAS, THE JUDICIAL STUDIES BD., REVIEW OF JUDICIAL TRAINING AND EDUCATION IN OTHER JURISDICTIONS 19 (2006), available at http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf (stating that while some organizations, such as the National Judicial College, Federal Judicial Center, and National Center for State Courts, specialize in the training of judges, judges in the federal courts have no training requirements and state courts require only between 7 to 15 hours of training per year).

do judges and justices maximize?” with a resounding, “the same thing everybody else does.”¹³¹ Although his goal was to make the economic study of judging a respectable academic field—and he succeeded—he achieved another goal.¹³² He demonstrated the appropriateness of drawing parallels between the motivations of judges and the motivations of those that experience similar incentives, even those in such far flung contexts as non-profit organization management, election voting booths, and theatrical audiences.¹³³ This testing instrument attempted carefully to mimic those incentives. Whether it succeeded can be questioned, but we can be heartened by the fact that it has replicated real-world results (such as the influence of time on decisionmaking as well as the differential constraining effect of rules and standards) and returned consistent experimental results.

Regarding the limitations posed by the divisive nature of the issue that our subjects adjudicated, we must again temper our desire aggressively to generalize from our results. The majority of cases do not concern hot-button issues. Still, we must not hastily dismiss their application to real-life cases. Despite the fact that our simulated case was more ideologically salient than many legal cases are, the testing instrument nevertheless allowed us to monitor the passions of our subjects. And it was apparent that they exhibited an entire spectrum of passions with respect to the fact pattern. Most subjects labeled themselves as six or seven out of ten in their level of satisfaction regarding the rightness of granting asylum in the baseline phase. Secondly, cases in which parties miss deadlines and risk losing otherwise meritorious cases, such as we had here, are not at all atypical.¹³⁴

Perhaps most importantly, we also wish to emphasize that our goal here has been to focus on foundational aspects of adjudication rather than on the particular dynamics of legal argument in the American court system. This is a study of how legal argument impacts adjudication, broadly understood. And while our wish to examine this fundamental dimension of legal practice somewhat abstractly limits the directness with which our findings may be applied to any particular court, it might permit broad but indirect application to courts, generally.

In short, we view this study as a contribution to the basic level of our understanding of legal argument. Our hope is that the results will lead to further behavioral experimentation in this context as well

131. Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

132. *Id.*

133. *Id.* at 1. (“[T]he essay models the judicial utility function in terms that allows [sic] judges to be seen as ordinary people responding rationally to ordinary incentives.”).

134. *Cf.* Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 949 n.84 (2008) (“Although agencies make quicker decisions if they confront deadlines, all else being equal, they often miss the deadlines themselves.”).

as inform the hypotheses of future statistical research of actual cases. Further studies could test more varieties of argument, different combinations of argument unbalance, or argument from different sources. Each of these factors might influence the attractiveness of resorting to argument and the final decision made. Also, studies ought to consider evolution from repeat play. Analysis of or experimentation with repeat cases or progeny cases before the same judge would help us further understand the power of familiarity and salience on decisionmaking.

C. *Political and Social Implications*

With the disclaimer that further study is necessary, the results here challenge a number of widely held sociopolitical assumptions. Most important is the assumption of our jurisprudence that legal argument performs a valuable public service: in the hands of our adversarial system, the presence of legal argument in a case makes it more likely that the judge deciding the case will reach the best legal result.¹³⁵ To many people, the straightforward application of the law is the best, or even the correct, way to resolve a legal dispute.¹³⁶ They not only believe that the law provides clear enough guidance to permit judges to reach objectively best or correct results—an assumption that they share with the Legalists—they also believe that when the straightforward result is evident, the judge has a legal and social duty to reach that result.¹³⁷ Insofar as the scenario tested here is representative of typical cases, the results suggest that legal argument can work against these goals: it can help judges get around the straightforward commands of the law. For those fond of the term, it could fairly be stated that the results indicate a relationship between legal argument and “judicial activism.”¹³⁸ Perhaps the aspect of our results

135. See *supra* Part I.

136. See Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 970-71 (1989) (“If the case involves, as the criteria suggests, the straightforward application of clear and well-settled precedent which is not in need of any published explanation by the courts of appeals, then the correct decision and the correct basis of decision should be obvious to any person who is well trained in the law. Since federal district court judges are highly trained professionals, they should be expected to reach the correct decision in such cases and thus to have their decisions affirmed.”). See also *supra* note 23 and accompanying text.

137. See *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985) (“The language of the statute at issue is plain and straightforward and the words, therefore, must be accorded their plain meaning.”); Mark Tushnet, *Self-Formalism, Precedent, and the Rule of Law*, 72 NOTRE DAME L. REV. 1583, 1589 (1997) (“I won’t do the conceptual work if I think of myself as a ‘plain-meaning kind of guy.’ Rules are straightforward linguistic statements whose meanings are apparent to me upon reading them.”).

138. Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 235 (1988) (“[P]eople would object less to our favorite activist decisions if we could convince them that those decisions emerged from a straightforward reading of the constitutional text.”).

that is most troubling in this regard is the fact that this effect occurred when the law's power was at its apex, that is, when the law was in the form of a pure rule and therefore was capable of straightforward application.¹³⁹ This is a red flag that the marketplace of ideas principle justifying our adversary system might be a poor fit in the judicial context because the ultimate arbiters—the judges—will fail to evaluate the ideas with an objective eye.¹⁴⁰ We have common sense and empirical grounds¹⁴¹ to believe that judges are, like all of us, political animals,¹⁴² and they are motivated in sufficiently salient or otherwise ideologically important cases to consider arguments in a one-sided fashion.

Of course, our results are likely to have the most predictive value in areas of the law that have a strongly rule-like or strongly standard-like character. The law is heterogeneous patchwork, with some areas being distinctly more standard-like or rule-like than others. Moreover, our findings challenge commonly held assumptions pertaining to those areas.

Standard-like areas have a higher proportion of norms with evaluative content or similar tests that force judges to utilize their discretion.¹⁴³ For example, numerous scholars maintain that balance tests provide judges with near unlimited discretion.¹⁴⁴ After all, when the balancing test asks for weighing the incommensurable or comparing the incongruous—for example, balancing a bushel of horsefeathers against next Thursday, as Chief Justice Roger Traynor famously observed¹⁴⁵—the judge is likely to arrive at her favored results because the test does not prescribe any specific result. Academics have made much of this fact in the fields of intellectual property and constitu-

139. See, e.g., GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 122-23 (1978); JAMES FITZJAMES STEPHAN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 166 (1863).

140. See, e.g., HAZARD, JR., *supra* note 139, at 122-23; STEPHAN, *supra* note 139, at 166.

141. See COLLINS, *supra* note 49.

142. Cf. ARISTOTLE, *THE POLITICS* I.2. (T.A. Sinclair trans., 1962).

143. See Sheppard, *supra* note 34.

144. See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 266 (1995) (footnotes omitted) ("Commentators and judges who prefer standards or balancing tests in constitutional law argue that standards advance values of fairness and substantive equality by permitting individuated results. Furthermore, by increasing the deliberation about the value choices underlying substantive decisions, standards promote constitutional dialogue and render decisionmakers more accountable."); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1467 (1995) ("One common charge against the typical multipronged standard and multi-part opinion is that many of the so-called standards or tests are far less useful than their superficial complexity and appearance of precision might indicate."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1394 (1995) ("Balancing tests" are "mansions of many rooms in which implementing judges may move about freely . . .").

145. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 754 (1963).

tional law. Trademark infringement suits revolving around the likelihood of confusion, for example, require a test with at least eight factors.¹⁴⁶ Fair use analysis focuses on four non-exhaustive factors with variable weights.¹⁴⁷ The idiosyncratic application of these tests has naturally led to unpredictable results.¹⁴⁸ Unpredictability is perhaps most pronounced when dealing with the Establishment Clause, where it is not entirely clear which test to apply and the meaning of the factors within one test are not fixed.¹⁴⁹

Rule-like areas of the law have a higher proportion of descriptive, bright-line norm content.¹⁵⁰ One of the most important areas of the law with rule-like character is the criminal law. Though recent Supreme Court decisions¹⁵¹ have made the federal sentencing guidelines merely advisory, the federal criminal code remains replete with mandatory minimum and maximum sentences based on quantitative empirical findings. For example, a defendant convicted of possessing a certain weight of drugs¹⁵² or with a certain number of prior convictions¹⁵³ will have a vastly different sentencing range than a defendant

146. The Ninth Circuit employs the eight-factor *Sleekcraft* test: strength of mark; proximity of goods; similarity of marks; evidence of actual confusion; marketing channels used; types of goods and degree of consumer care expected; defendants' intent in selecting the mark; and likelihood of expansion of product lines. See *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1026 (9th Cir. 2004).

147. The four factors are "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2012). The Supreme Court has vacillated as to whether the factors are to be weighed equally. Compare *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (noting that all the factors are "to be explored, and the results weighed together, in light of the purposes of copyright") with *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (declaring market harm factor "undoubtedly the single most important element of fair use"); see also Note, *Spare the Mod: In Support of Total-Conversion Modified Video Games*, 125 HARV. L. REV. 789, 797-802 (2011) (collecting criticism of the doctrine).

148. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 561-64, 604-06 (2008).

149. Compare *Salazar v. Buono*, 130 S. Ct. 1803, 1819-20 (2010) (doubting appropriateness of test) with *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (setting out test). See also *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 594-95 (1989).

150. Sheppard, *supra* note 34, at 97-98.

151. *United States v. Booker*, 543 U.S. 220, 242-44 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

152. See, e.g., 18 U.S.C. § 924(e)(1) (2012) ("In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .").

153. See, e.g., 21 U.S.C. § 841(b)(1)(D) (2012) ("In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of

who does not meet those criteria. Judicial displeasure with the sentencing guidelines is evinced in countless opinions criticizing enormous sentences for crack cocaine possession¹⁵⁴ and child pornography.¹⁵⁵

One of our primary findings was the disparate impact of argument on legal constraint. A majority of subjects who were confronted with the hard and fast rule (a straightforward reading of which would require deportation) did indeed deny asylum. When argument was introduced (even argument weighted equally on both sides of the issue), however, a mere quarter of the rule subjects denied asylum. Argument, therefore, seems to be of greater importance when a case involves a rule rather than a standard.

When cases fall into these areas of law, one would normally assume that advocacy would be of relatively *heightened* importance compared to areas in which the law is rule-like: convince the judge that your side is right and there will be nothing standing in the way of your preferred verdict. However, our results suggest that the opposite appears to be true. Instead, the advocate is most valuable when she provides a legal escape for a motivated judge facing a straightforward, rigid rule.

Turning now to the social utility of legal argument, we wish to be clear: We do not believe that these results ought to be seen as lending support to an initiative to strip legal argument from litigation, if any such initiative were to arise. Even if the presence of legal argument poses a risk that the judge will use argumentation as an ideological or personal tool, the no-argument alternative, without much, much more invasive measures (such as aggressive additional resource restriction of dubious value and oversight) would do little to hinder ideologically motivated judges from reaching their preferred decisions. Rather, our modest hope is that these results spur increased scrutiny of judicial consideration of legal argument and should dampen the Legalist rhetoric that bolsters the adversary system.

More heartening, perhaps, are the results that lend support to aspects of Legalism, such as the evidence that legal content, particularly the distinction between rules and standards, constrains in an expected manner (even if it did not constrain as many subjects as might be expected). In other areas of court study, there is a quickly developing consensus that empiricists engaging in statistical analysis of ac-

flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years . . .”).

154. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (responding, in part, to these judicial concerns).

155. See, e.g., *United States v. Apodaca*, 641 F.3d 1077, 1082-84 (9th Cir. 2011) (reviewing sentence for substantive reasonableness); *United States v. Grober*, 624 F.3d 592, 603-10 (3d Cir. 2010) (same); *United States v. Dorvee*, 616 F.3d 174, 182-88 (2d Cir. 2010) (same).

tual cases can no longer ignore the content of law that judges consider.¹⁵⁶ The results here might be a valuable addition to that literature because they show empirically, and for the first time, a powerful interaction between legal norm content and the effect of legal argument. Moreover, the increased constraint of rules in this simulation overpowered the dampening effect of argument on them. That is, rules can operate as a check on judicial ideological motivation even in an environment of balanced legal argument.

Lastly, this study helps us understand legal constraint as a fragile phenomenon, one augmented by factors that are outside of the constraining power possessed by authoritative legal texts alone. Just as the time judges have to decide cases matters,¹⁵⁷ the availability of legal argument matters. Those jurists who have analyzed law's constraining power conceptually have tended to view law in isolation;¹⁵⁸ what matters to them is the native constraint of the terms in the legal norm itself. While it is undoubtedly true that norm content performs in ways that are largely consistent with, but not identical to, our philosophical intuitions, the possibility that extra-legal factors might make a tremendous predictable difference to adjudication means that we must lift our eyes from the books and examine the entire context in which the judge as a human subject finds herself. As much as we might wish to model this context using a single simplified model of judicial behavior, such as those advanced from Legalism, Attitudinalism, or Institutionalism, it is more likely that judges are like the rest of us—small things can make a big difference:

Thus, a judge's decision process is bound to be affected by the particular psychological environment within which it is performed. Rather than adopt a single unitary conception of the modus operandi of a judge—such as Dworkin's Hercules or Kennedy's political judge—we can benefit more from following a differentiated approach that corresponds to more precise types of psychological environments in which judges operate.¹⁵⁹

156. See Cox & Miles, *supra* note 33 (footnote omitted) (“Debates about rules and standards almost inevitably begin with the presumption that rules constrain judges more than standards. Judicial decisions seemingly provide a wealth of potential empirical data about the strength of this presumption. But by sidestepping legal doctrine almost entirely, studies of judicial behavior fail to capitalize on this resource. Studies that consider whether rule-like doctrines actually exert a more constraining effect than standard-like ones are remarkably rare. In view of the resurgent interest in empirical legal studies, the omission of legal doctrine from statistical studies of judicial decisionmaking is particularly surprising.”); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1547 n.39 (2009).

157. See Sheppard, *supra* note 32.

158. See, e.g., HART, *supra* note 20, at 128-36, 272-73; JOSEPH RAZ, *THE AUTHORITY OF LAW* 103-05 (1979).

159. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 39 (1998) (footnotes omitted).

VI. CONCLUSION

This study provides empirical evidence that legal argument affects the resolution of the disputes in which they are raised. The observed influence has two important—and surprising—dimensions. First, the presence of balanced legal argument appears to have affected decisionmaking under a straightforward, constraining legal rule but not under a discretionary standard. Secondly, within those parameters, the presence of balanced legal argument appears to have made it more likely that the dispute would be resolved in the direction that the decider preferred in the absence of law.

This relationship between the content of legal norms and legal argument can be explained by considering the mechanics of legal constraint on our subjects. The straightforward constraining rule, as opposed to the discretionary standard, made it significantly more difficult for subjects to justify the outcome they preferred. Nevertheless, subjects who felt most strongly about the righteousness of that preferred outcome were most likely to be motivated to engage in work to get around the rule and reach their preferred outcome. When argument was present, it made this work easier by providing ready-made justifications for the judge to rely upon. With the assistance of this work short cut, the proportion of subjects that reached their preferred outcomes in the face of a constraining rule was significantly higher for subjects in the presence of argument than for subjects in its absence.

Our results lend support to a reconceptualization of legal argument: in the resolution of disputes, it is a tool put into service for the sake of providing a convincing justification of a preferred outcome. In short, there is evidentiary support for the notion that legal argument makes it easier for judges to work around the straightforward dictates of the law. More research is necessary before such a reconceptualization would be warranted, but our results should make proponents of straightforward adjudication question whether they can accept on blind faith the notion that legal argument in the adversarial system has the salutary effect of making judges more likely to reach the best legal outcomes.

VII. APPENDIX (EXPERIMENT FRAMEWORK)

Note: Bracketed explanatory phrases in the section titles were not visible to subjects.

The Decision-Making Study [Baseline Phase Fact Pattern and Questions]

***** *Assume that you live in a country very much like this one and you are asked to make a determination based on the following facts. You are not a judge under your legal system, and assume that you do not know the laws of your system, nor are there any laws that would decide this case. The facts are as follows:*

A citizen of a foreign nation ("the alien") has legally entered our country on August 1, 2007 with a valid 1-year work visa issued that same day. He fled his home country after being persecuted for his activism on behalf of the poor and his anti-establishment political opinion. He had been imprisoned for his political protests briefly in 2006, and he and his family had been threatened by the local police force. Worried for his personal safety, he obtained the visa and arrived here. He could not speak English and was largely ignorant of our laws regarding asylum, which is the mechanism our country uses to allow aliens to reside here who have been or fear being persecuted on account of their race, religion, nationality, membership in a social group, or political opinion. He began working in a restaurant shortly after his arrival, but his employer never asked him to show documentation indicating that he was a legal worker. He was paid under-the-table. On July 31, 2008, his visa expired. He continued to work at the restaurant, however, receiving pay as usual for the next 13 months. At that point, a new employee began work at the same restaurant. The new employee soon learned of the alien's experiences in his home country and of his expired one-year visa. The new employee explained to the alien that staying here after the expiration of the visa was illegal but that he might qualify for asylum on the ground of past persecution for political opinion. She suggested that the alien file a petition for asylum. The alien retained a lawyer and filed a petition about 4 weeks later on September 25, 2009. If granted asylum, the alien will have the legal right to live here indefinitely. If denied asylum, he will be removed from our country and transported back to the country of his citizenship.

Based on the information given, and assuming that the facts are true, please answer the following questions: The court should do one of the following two options (choose one):

Deny Asylum Grant Asylum

*** To confirm that you have clicked the correct button, please choose the response that you selected in the previous question from the drop-down menu below:**

Please confirm your previous response:

*** On the scale below, indicate the strength of your conviction that your answer for question 1 is the right thing to do, all things considered ("1" is weakest and "10" is strongest):**

1 2 3 4 5 6 7 8 9 10

The Decision-Making Study	[Example of Instructions and Justification Section]
<p>In this section you will be asked to write a justification for your decision.</p> <p>There is no time limit, so you may take as much time as you need to write a convincing justification. Please do not feel the need to work beyond that point. There are no word or length limits or requirements of any kind, and you may write as much as little as you think is necessary. A single paragraph can be sufficient.</p> <p>If you complete this entire survey, you will be entered into a lottery. If you win, your justification will be reviewed by a neutral expert who has been selected by the organizers of this project. He or she will not be a student at your school. <u>If you are able to persuade this expert that you have written a convincing justification, you will win the \$300.</u></p> <p>Furthermore, by convincing the expert that your justification is convincing, your determination will have real-world consequences:</p> <p><i>If you choose to justify a grant of asylum, \$75 will be donated to the non-profit organization Grantmakers Concerned with Immigrants and Refugees, which, among other things "seeks to influence the philanthropic field to advance the contributions and address the needs of the world's growing and increasingly diverse immigrant and refugee populations."</i></p> <p><i>If you choose to justify a denial of asylum, \$75 will be given to the non-profit organization the Federation for American Immigration Reform, which seeks, among other things, "to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest."</i></p> <p><u>If, in writing out your justification, you find that you no longer agree with the answer you entered on the previous page, you are welcome to justify a different answer. If you do, however, be sure to go back to your prior responses to make sure that they accurately reflect your new decision.</u></p> <p>After you click "NEXT," a box will appear in which you should type your justification.</p>	
JUSTIFICATION	
<p>* PLEASE WRITE YOUR CONVINCING JUSTIFICATION IN THIS BOX AND CLICK NEXT WHEN FINISHED.</p> <div data-bbox="435 1073 1114 1136" style="border: 1px solid gray; height: 30px; width: 100%;"></div> <p>* Now that you have written your justification, please indicate for the final time your decision:</p> <p><input type="radio"/> Grant Asylum <input type="radio"/> Deny Asylum</p>	
JUSTIFICATION	

The Decision-Making Study

*** To confirm that you have clicked the correct button, please choose the number that you selected in the previous question from the drop-down menu below:**

Choose

Confirm previous response:

Asylum Decision (R)

[Rule Condition Fact Pattern]

***** *Assume that you live in a country very much like this one and you are asked to make a determination based on the following facts. You are an immigration judge sitting on a court known as the Superior Immigration Court. You are the first judge that has considered this case. Because you are a judge, you ARE expected to know the relevant laws of your system, which are provided. The facts are as follows:*

A citizen of a foreign nation ("the alien") has legally entered our country on August 1, 2007 with a valid 1-year work visa issued that same day. He fled his home country after being persecuted for his activism on behalf of the poor and his anti-establishment political opinion. He had been imprisoned for his political protests briefly in 2006, and he and his family had been threatened by the local police force. Worried for his personal safety, he obtained the visa and arrived here. He could not speak English and was largely ignorant of our laws regarding asylum, which is the mechanism our country uses to allow aliens to reside here who have been or fear being persecuted on account of their race, religion, nationality, membership in a social group, or political opinion. He began working in a restaurant shortly after his arrival, but his employer never asked him to show documentation indicating that he was a legal worker. He was paid under-the-table. On July 31, 2008, his visa expired. He continued to work at the restaurant, however, receiving pay as usual for the next 13 months. At that point, a new employee began work at the same restaurant. The new employee soon learned of the alien's experiences in his home country and of his expired one-year visa. The new employee explained to the alien that staying here after the expiration of the visa was illegal but that he might qualify for asylum on the ground of past persecution for political opinion. She suggested that the alien file a petition for asylum. The alien retained a lawyer and filed a petition about 4 weeks later on September 25, 2009. If granted asylum, the alien will have the legal right to live here indefinitely. If denied asylum, he will be removed from our country and transported back to the country of his citizenship.

On June 1, 2007, our country enacted its first set of immigration laws. Among them was the following:

Sec. 1:02: Aliens seeking asylum must file their petitions within 6 months after the day upon which their work visas expire.

Because the law is so new, there have been no cases in which courts have interpreted it. When the domestic law is inadequate, it is acceptable for courts to base their decisions upon the laws, policies, purposes, or principles of other jurisdictions, although that is ordinarily viewed as secondary authority and, therefore, is not strictly binding.

Based on the information given, and assuming that the facts are true, please

The Decision-Making Study

[Standard Condition Fact Pattern]

*

Assume that you live in a country very much like this one and you are asked to make a determination based on the following facts. You are an immigration judge sitting on a court known as the Superior Immigration Court. You are the first judge that has considered this case. Because you are a judge, you ARE expected to know the relevant laws of your system, which are provided. The facts are as follows:

A citizen of a foreign nation ("the alien") has legally entered our country on August 1, 2007 with a valid 1-year work visa issued that same day. He fled his home country after being persecuted for his activism on behalf of the poor and his anti-establishment political opinion. He had been imprisoned for his political protests briefly in 2006, and he and his family had been threatened by the local police force. Worried for his personal safety, he obtained the visa and arrived here. He could not speak English and was largely ignorant of our laws regarding asylum, which is the mechanism our country uses to allow aliens to reside here who have been or fear being persecuted on account of their race, religion, nationality, membership in a social group, or political opinion. He began working in a restaurant shortly after his arrival, but his employer never asked him to show documentation indicating that he was a legal worker. He was paid under-the-table. On July 31, 2008, his visa expired. He continued to work at the restaurant, however, receiving pay as usual for the next 13 months. At that point, a new employee began work at the same restaurant. The new employee soon learned of the alien's experiences in his home country and of his expired one-year visa. The new employee explained to the alien that staying here after the expiration of the visa was illegal but that he might qualify for asylum on the ground of past persecution for political opinion. She suggested that the alien file a petition for asylum. The alien retained a lawyer and filed a petition about 4 weeks later on September 25, 2009. If granted asylum, the alien will have the legal right to live here indefinitely. If denied asylum, he will be removed from our country and transported back to the country of his citizenship.

On June 1, 2007, our country enacted its first set of immigration laws. Among them was the following:

Sec. 1:02: Aliens seeking asylum must file their petitions within a reasonable time after the day upon which their work visas expire.

Because the law is so new, there have been no cases in which courts have interpreted it. When the domestic law is inadequate, it is acceptable for courts to base their decisions upon the laws, policies, purposes, or principles of other jurisdictions, although that is ordinarily viewed as secondary authority and, therefore, is not strictly binding.

Based on the information given, and assuming that the facts are true, please answer the following questions:

The court should do one of the following two options (choose one):

Grant Asylum

Deny Asylum

The Decision-Making Study

[Argument Condition Example]

Counsel for both sides have raised a series of arguments.

Counsel for the alien argues (in no particular order):

Traditionally, we have given courts the discretion to rely on equitable principles when the cold, straightforward application of the law would bring about unjust consequences like forcing someone into political persecution or risk of death.

The text of the document does not specify a penalty, leaving to the judge discretion to choose an appropriate one, which is to grant asylum despite the lateness.

In *Ef v. Gov* (2001), the federal appeals court upheld the acceptance of a prisoner's brief even though it was filed 8 months after the deadline because the prisoner was representing himself without a lawyer and because the denial would have resulted in the serious consequence of life imprisonment. We can infer that the legislature introduced this deadline to ensure that the evidence in favor of or against granting asylum does not grow stale. The asylum law, itself, was created out of concerns for basic human fairness, not to disproportionately penalize.

The periods of greatest economic growth in this country coincide with periods of open immigration. Here, denying asylum in cases like this robs us of productive workers; whereas granting asylum allows us to monitor and tax more people.

For these reasons, asylum ought to be granted.

Immigration office counsel raises the following arguments (in no particular order):

In *Cee v. Bee* (2001), the federal appeals court upheld the lower court's dismissal of a complaint arising out of a slip and fall at a government facility. The complaint was filed 8 months after the lapse of the statute of limitations period due to the plaintiff's ignorance of the deadline.

Following the text of the asylum filing law, the outcome here is clear: the alien ought to be denied asylum for missing the deadline.

Allowing aliens to escape legal scrutiny indefinitely by not imposing strict deadlines for filing allows them to occupy jobs that legal aliens or citizens could have. As a result, respect for law goes down and unemployment goes up.

Traditionally, countries have not allowed foreign visitors to remain when they have tried to hide from the government while within their borders. This is particularly true when the person hiding has decided to accept benefits that the country provides without paying the costs that they would have paid if they weren't hiding.

We can infer that, by introducing this law, the legislature intended to curb the number of aliens that have abused the system by staying in the country for as long as they want before facing the scrutiny of the courts.

For these reasons, asylum ought to be denied.

The Decision-Making Study [Dependent Variable Entry Example]

*** Based on the information given, and assuming that the facts are true, please answer the following questions: The court should do one of the following two options (choose one):**

Grant Asylum Deny Asylum

*** To confirm that you have clicked the correct button, please choose the response that you selected in the previous question from the drop-down menu below:**

Please confirm your previous response:

*** On the scale below, indicate the strength of your conviction that your answer for question 1 is the right thing to do, all things considered ("1" is weakest and "10" is strongest):**

1 2 3 4 5 6 7 8 9 10

*** To confirm that you have clicked the correct button, please choose the number that you selected in the previous question from the drop-down menu below:**

Choose

Confirm previous response:

INSTRUCTIONS